JUSTICE IN ENGLAND

by

A BARRISTER

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INTRODUCTION

THE PURPOSE OF this book is to give a short description of our legal system as it stands to-day. It deals mainly with England and Wales, and an apology is due for the absence of any express reference to Scotland, where the law itself is in many respects different, although its social or anti-social aspects are in essence the same.

It is important to study the system in the light of its political and still more of its economic background. The law, like every other manifestation of our life, suffers from the fact that the people who write about it, help to administer it, and make money out of it, all belong with insignificant exceptions to the middle class. As a result, they tend to judge it as it affects themselves. Meantime, without many people even realising it, the working class, something like seven-eighths of the nation, who have very little to do with the administration of law, who make no money out of it, and who seldom write anything printable about it, hold a view of it utterly opposed to that of the average member of the middle classes. The latter generally thinks we have a very fine system, probably the best in the world, and he has doubts only when he actually comes into direct contact with it himself. The working class in general hold it as something to be avoided at all costs; if a worker is politically conscious, he regards it as his intentional enemy; if he is not, he thinks it

at any rate so ill-fitted to help him to any of his rights or defend him against any wrong that it is not much better than an enemy.

But the vital truth about our legal system, which it is hoped to demonstrate in this book, is that it is part and parcel of our economic and class system. It is bad because that system is bad, and in the same way. It hurts the poor and helps the rich, not out of malice but inevitably, like the rest of the system, because it is "all built that way". It hinders progress and helps reaction for the same reasons and in the same way. In emergency it becomes unconsciously an instrument of Government policy to support the tottering structure, just like every other still workable part of the system. As the Bishop of Goulburn, N.S.W., expressed it, perhaps as well and as shortly as it can be expressed, in the preface which he wrote to the book "Injustice Within the Law" (the treatise by Mr. Justice Evatt, of the High Court of Australia, on the Tolpuddle case): "Courts of law are the instruments by which the dominant opinion finds momentary legal expression."

It is wrong even to blame too severely the judges, the magistrates, or the lawyers. They may be blamed, like most of the rest of their class, for not having sufficient political and economic insight to realise that the system should not any longer be supported. But they should not be asked to shoulder any other or further blame, for in the absence of that insight they are merely part of the blind middle-class mass, driven inexorably by the forces of the social system and class-structure which their ancestors allowed to grow up

and which favours them temporarily, even whilst it is preparing to tip them all into the abyss. They are in short no more to be blamed than the scientists, brewers, doctors, armament manufacturers, parsons, slum landlords, colliery owners, or anybody else who is for the moment, materially speaking, on the right side of the fence.

As one studies the system in its separate parts, the judges, the magistrates, the lawyers, the provision for poor litigants, the law itself and its procedure, it becomes ever clearer that it is but a part of a whole, a limb of the body of capitalism, sharing with it *inescapably its inequality, its social injustice, and all* its symptoms of decay.

There is, however, one particular and additional obstacle to any major reform of our legal system, apart from its implication in the general capitalist structure; this obstacle is the deeply-held conviction of our upper and middle classes that the system is as near perfect as it can be. The Englishman is commonly accused of hypocrisy, but it is probable that his greatest characteristic is an infinite capacity for self-deception. Self-deception as to the merits of any particular institution, with the complacency that accompanies it, present of course the most formidable obstacles to reform, for no one is enthusiastic about proposals for reform when he is convinced that none is needed.

It is true that the system is probably past any piecemeal reform. It would be unjust to ignore the efforts which many earnest people are making to tinker with this or that bit of the surface, but it is plain that justice is incompatible with capitalism and

class-domination, and that our legal system will not undergo more than superficial reform during the short time that those two associated iniquities survive. The book ought perhaps, following the well-known precedent of the snakes in Iceland, to have one additional chapter, thus:

JUSTICE IN BRITAIN

There can be no true justice in a capitalist country.

CHAPTER I

JUDGES AND MAGISTRATES

THE WORD JUDGE brings to the minds of middle-class people a picture of an elderly gentleman of great eminence and learning, wearing robes and a wig, and sitting to decide important cases in the Civil Courts, with occasional journeys round the country to deal with criminal prosecutions. The middle class here makes its usual mistake of confusing that tiny section of the nation which it really knows and admires with the whole; it reminds one indeed of the Tory M.P. who in a letter to the newspapers in the autumn of 1931 told a credulous world that the real cause of reduced expenditure on consumption goods was that "people" were receiving less by way of dividend, owing to the slump. For our highly-trained professional judges (roughly forty in the House of Lords, Court of Appeal, and High Court, and fifty judges of County Courts), form a tiny proportion, numerically speaking, of the total judicature of the country. The overwhelming majority is formed by the magistrates or justices of the peace. Let us begin by seeing how these latter gentlemen, whose judicial functions are varied and important, are appointed. The truth, as often in England, is so bad that it seems impossible that it can be true.

Their appointment lies in theory in the uncontrolled power of the Lord Chancellor, who himself occupies the curiously anomalous position of being at once the

head of the judiciary, which is of course supposed to be non-political, and a member of the Cabinet, going in and out of office with the changes of political fortune, like the rest of the Ministry, and taking an active part with his Cabinet colleagues in the political government of the country. In practice, the Lord Chancellor makes the appointments from lists drawn up by groups of existing magistrates in the various counties and boroughs, who are known as Advisory Committees. In general, the Lord Chancellor removes few names from these lists, and rarely adds any; thus, in practice, magistrates are appointed by these Committees, by a system of co-option. It is only right to add, however, that in October 1937, the Lord Chancellor, Lord Hailsham, stated that it was not his own practice simply to appoint the names on the lists submitted to him; he did not, he said, make appointments unless he was satisfied that increased numbers were needed in the areas concerned, nor did he appoint a man merely because he was "a very good fellow". Moreover, he "would not make appointments because a person was a prominent politician or because a person wanted it as an honour".

But, whatever may be the views or intentions of Lord Hailsham, or his implied criticisms on some of his predecessors, the fact remains that probably as many as nine-tenths of the magistrates appointed have generally been persons active in local politics, and that in a large majority of cases the appointments are sought by the candidates, and their names are put forward by the Advisory Committees, with a view to the recognition of political services. It is not without

reason that the suffix "J.P.", indicating that one is a magistrate or "Justice of the Peace", is scornfully called "the knighthood of the underlings". An overwhelming majority of the magistrates are Tories, but there is a substantial number of Liberals, and in many areas there are some Labour men, mostly but not invariably "safe". In industrial boroughs, indeed, Labour will be comparatively well represented, although of course far below its true proportion.

The political flavour of the magistracy, and the political reasons for the great bulk of the appointments, are so universally known that even the well-armoured readers of "The Times" must have had a moment's surprise when they read in the report of Lord Hailsham's speech, already mentioned, that in his view "it would be a bad day for this country if persons were to be placed in the important position of administering justice simply as a reward for the services that they might have given to their country—and, worse still, for the service they might have rendered to a political party". The "bad day" which Lord Hailsham was so anxious to avert has of course been with us for many years.

The magistrates are unpaid, but there is an ample supply of candidates, in search of badges of prestige or political advancement. They are not expected to know, and do not know, any law. Indeed, it has been established as clear law that it is not defamatory of a magistrate to say that he knows no law, for there is no reason why he should.

No attempt is made to teach them any law, or anything about their duties, either before or after their

appointment. They are just left to do their best, or worst, in a country whose law and procedure are among the most complicated in the world. Very few of them are women. They have of course no training in, and normally no knowledge of, criminology, penology, or psychology; (in this, they resemble the High Court judges). Nothing in their history, generally speaking, gives ground for the hope that they could weigh evidence impartially, exclude irrelevant matters from their minds, or even realise that there are matters which ought to be excluded from their minds. Here, in the most difficult, complicated, technical work, of the gravest social (or anti-social) importance, amateurism seems as important as it is in lawn-tennis, and much more completely realised. Once appointed, magistrates are very rarely removed, and hundreds of them go on sitting into the eighties and nineties, and even occasionally after their hundredth birthday. It is not uncommon, especially in the country, to find a bench of an *average* age of 75 or 80, and the proportion of serious deafness is generally over 33⅓% and sometimes reaches 100%. In a case which was reported in the Press a little while ago, suggestions had been made that a magistrate of 98, who had given up adjudicating on account of deafness at the age of 96, should retire altogether. The Chairman of his Bench opposed the suggestion, stating that he was "a very useful man for signing warrants", and mentioned that his colleagues had asked him to sit several times since he had given up on account of deafness. Signing warrants for the arrest of individuals or the search of premises is of course very important

work requiring judicial consideration of evidence, although it is done in private, and the police can make their application for a warrant to any magistrate they select. In a political case in the North of England a few years ago, a warrant which many critics thought should not have been granted was obtained from a magistrate 101 years old. (It is almost pathetic to recall that Lord Hailsham, in the speech quoted above, appealed to magistrates to resign from their position when no longer equal to their work. He described resignation in such circumstances as a "patriotic duty", a "considerable sacrifice", and "an honourable and patriotic discharge of a civic duty". It might have been thought that this encouragement would have led to a good many resignations; but it had little effect, and had to be followed up by a vigorous newspaper campaign for the resignation of magistrates who did not normally officiate owing either to advanced age or to their having moved out of the district where they had been appointed. As a result of this campaign, a few hundred elderly or "absentee" magistrates resigned, and the public no doubt felt that a useful reform had been achieved; but little advantage can have resulted, for the real evil lies in those magistrates who do officiate, not in those who do not, and the resignations in any case only form a very small percentage of the total involved.)

The only legal assistance these benches receive is that of a solicitor who acts as their clerk; this is generally a part-time appointment, and the clerk of one court, under a duty to advise magistrates impartially in cases brought by the police, is not infrequently

the same person as the solicitor who acts regularly for the police in another court. Indeed, in one recent instance, the clerk to the justices examined the witnesses for the prosecution, advised the magistrates on disputed questions as to the admissibility of evidence, accompanied them when they retired to consider whether the accused should be committed for trial, and afterwards, when he had been committed, acted as the solicitor to instruct counsel[1] to prosecute at the Quarter Sessions.

It is not surprising that untrained justices, appointed in this fashion, will flock to sit[2] in cases where their friends, personal or political, are involved, or where some activity they resent, such as poaching in the country or chalking political slogans in the towns, is the subject of a prosecution. If someone raised the objection that they were "packing" the court, they would probably have to have the meaning of the accusation explained to them, and when they finally understood it, half of them would say: "Quite right too!" and the other half: "Oh! That's different!"

Now, what judicial work do these justices do? It is not unimportant. Every criminal case in England, with perhaps one exception in 300,000, has to begin before justices in "petty-sessional" courts, commonly called police courts; the only apparent breach in the wall of amateurism is that in London and a certain number of other large towns barristers are appointed to sit as justices and paid a salary; they are called stipendiary magistrates ("stipendiaries" for short).

[1] See p. 56.

[2] Whilst normally a Bench must not consist of less than two justices there is no upward limit to the number who may sit.

All the smaller criminal charges (the vast majority in number) not merely begin in the police court, but also end there (this is known as summary procedure, and is further explained on p. 111) so that a man whose character is affected by what may be a really serious charge has no chance even to be tried by a judge who has any training beyond what he has picked up as he goes along from the clerk or from amateurs in the same position as himself[1]. In these cases, the justices may give sentences of imprisonment subject to maxima varying up to six months (—is it amusing or just infuriating that, whilst this limit of six months is imposed, every prison reformer and most prison authorities unite in the view that six months in prison is worse than useless, and that any good that can ever be done by imprisonment cannot be done in less than a year?—) and may impose fines, sometimes of hundreds of pounds.

In the more important criminal cases, called "indictable", which begin in the police courts but do not end there, the function of the justices is not to try the case but to ascertain from the evidence whether there is a *prima facie* case sufficient to be sent to Quarter Sessions or Assizes for trial with a jury. When doing this work, they are often called "examining magistrates", or "examining justices".[2] To make up one's mind whether there is such a *prima facie* case would not

[1] It should be mentioned that anyone charged with an offence in respect of which he may be sentenced to more than three months' imprisonment, has a right to demand a trial by jury, (see p. 117): but even this does not guarantee that he will come before judges who have any training in law, (see p. 18).

[2] See further at p. 112.

be easy work even for trained lawyers, and it is only too common for magistrates, faced with a heavy or difficult or doubtful case, to take the easy course of sending it for trial ("commit for trial") instead of facing the evidence squarely and making up their minds that it is not good enough. There is no appeal or other method of challenging a committal, and the accused then has to meet the anxiety, expense, delay and risk of the Assize trial, only to hear (in not a few cases) the judge say that the case never ought to have been committed.

But we have not yet finished with the functions of the magistrates. Of the cases, rare in proportion but still a substantial number in themselves, which are serious enough to be sent to trial with a jury at Assizes or Quarter Sessions, more go to Quarter Sessions than to Assizes, and the judges of Quarter Sessions are—the same untrained justices again! Heavy and important charges of serious crime are tried, difficult questions of admissibility of evidence are decided, the cases are "summed up" by the chairman to the jury (a delicate task, calling for real skill and clarity) and finally sentences are decided, by a group of these justices. It defies comment. Here, again, there is a breach in the wall of amateurism, or rather two breaches; in the first place, some Quarter Sessions, probably half in number and more than half in volume of work, have trained lawyers as chairmen, often with a salary, and in the second place the Quarter Sessions of certain towns have single judges called Recorders; these are barristers who act as Recorders as a part-time activity. But in all other cases (and

even in courts where the chairman is a trained lawyer, the court may sit in two divisions, and the chairman of the second court will nearly always be an ordinary lay justice) the citizen may be tried before untrained laymen and sentenced to penal servitude for many years. (Contrast the striking fact that, in civil litigation, where the middle classes are more directly concerned, and property instead of personal liberty is involved, the smallest case has to be tried before trained lawyers; the only exceptions of importance are certain civil cases which the magistrates have jurisdiction to hear, such as affiliation cases, wife-maintenance and separation cases, certain disputes between employers and workmen, and ejectment from small dwelling-houses. These are branches of litigation which either do not much concern the middle classes or are usually fought out by them in different courts [the Divorce Court or the County Court]. After all, why should money be wasted on supplying the working classes with costly judges; they don't get costly food?)

That is a tolerably complete statement of the work of the justices in court, although it should not be forgotten that they sit in Quarter Sessions to hear rating appeals, often involving very large sums. Appeal from their decision here is not easy and they contribute not a little to the confusion and uncertainty of rating law.

Justices have also certain non-judicial functions; in times of "disorder" they are charged with the duty of maintaining "the peace", and at all times they have the issuing of search warrants and warrants of arrest, functions which bring them into relations with the officers of the police, as between whom and accused

persons they have to adjudicate day by day as impartially as their untrained minds and their natural bias may permit.

A few words might be written about the behaviour of justices in court, apart altogether from questions of bias. A certain number of them are courteous and patient, but it is not too much to say that in the bulk of their courts both the layman and the lawyer must expect at any moment to be treated with rudeness, and not infrequently with gross discourtesy. It is bad enough for the lawyer; if it happens to him at all often, he will lose his practice in that court (unless all the other lawyers are treated equally badly) and in any case he may be human and sensitive, and it is extremely trying to be criticised and attacked without being really able to answer back. Still, the lawyer may be hardened to it, and it is part of his job. But to the layman, especially if he is attempting in this strange atmosphere to conduct his own case, such treatment is disastrous. To be vigorously rebuked, for example, for attending in one's ordinary working clothes, or without a tie, a particularly frequent form of snobbish rudeness, is not the best preparation for the severe intellectual ordeal of conducting a case for the first time.[1]

There is next to be considered the appointment of the judges of the House of Lords, Court of Appeal, and High Court, and then of county court judges, recorders, and stipendiary magistrates. Of the former group,

[1] A whole book could easily be written to illustrate the quite extraordinary behaviour of many justices, but no attempt is made here to give illustrations; the task has already been fulfilled superbly, from a wealth of personal experience, in a book called "English Justice" by "Solicitor".

whose salaries (apart from the Lord Chancellor) vary from £5,000 to £8,000 per annum, the fifteen most important are appointed by the Prime Minister, and the remainder by the Lord Chancellor. They number among them some very fine legal intellects, but the defects of the system of appointment have to be faced and estimated fairly. In the first place, they are all selected from among practising barristers; this is popular with barristers, and there is no doubt that it generally helps towards good relations between judges and the barristers who appear before them. It is claimed, indeed, by defenders of the system that the full knowledge that judges have or should have of work at the Bar makes them more fully able to understand the conduct of barristers, and thus to try the cases better than the judges in many countries, who are civil servants trained from the beginning of their career to be judges, without personal experience of practice as advocates. There is something in this argument, and judges and barristers do often understand one another very well, although laymen are struck by the extreme deference with which judges have to be addressed; (for example, it is part as it were of the technique of the court that the judge may interrupt counsel at any stage, even in the middle of a sentence in which he may be attempting to put one step of a complex argument, but that no one must interrupt the judge at any time). But it is nevertheless also true, and very serious, that judges occasionally treat the barristers who appear before them with the greatest rudeness, and deliver themselves of sudden and cruel attacks or criticisms, often based on an

imperfect understanding of the facts. It is virtually impossible for the barrister to answer back; even if it did not hurt his client's case still further, it would certainly be thought by his client to do so; and it is extremely difficult to obtain any subsequent explanation, apology, or redress. There are well-known men, not really hyper-sensitive, now doing useful work as legal advisers or in other capacities where they do not have to come into contact with judges, who have been literally driven from practice at the Bar by the way in which they have been treated by judges.

But in any case the system of appointing judges from the Bar does mean that those appointed to the difficult and supremely important work of judging between one side of a case and the other have had no judicial training, and have spent the best years of their life (they are generally appointed between 47 and 52) as advocates, putting the best points of one side against the other and glossing over the weaknesses. It is not of course impossible to be good both in advocacy and in judicial work, but proficiency in the former is no evidence of qualification for the latter. When Lord Sankey, in the debate in the House of Lords, which is set out at pp. 32-41,[1] observed of Lord Hewart that "even now at times he cannot forget the advocate", he was making a statement which is true in general application. There is a story of one judge some years ago, who in his time at the Bar had been a devoted politician rather than a distinguished lawyer, and who proved to be not too judicial on the Bench, being complimented by one of his friends as follows: "Old

[1] See especially at p. 39.

fellow, I never realised what a splendid advocate you were until I heard you sum up that case to the jury."

Another defect of the system is that, so far as such appointments go to the more prominent and successful barristers, these are men who have not for some considerable time had anything to do in practice (if they ever had) with the Criminal law with which they will have to deal as judges; for civil work is far more lucrative than criminal, and barristers are not immune from the temptation to sell their professional skill in the best market. Many are the stories of newly-appointed judges industriously studying students' text-books on criminal law, but this is a poor substitute for experience.

Those are the defects that may have to be faced when the Prime Minister and the Lord Chancellor are conscientious men who do their best to make good appointments; but it has not infrequently happened that the English upper-class tradition of regarding high office as the proper instrument for rewarding political service, doing a good turn to one's friends, pensioning one's less intelligent relatives,[1] or just "keeping the party together",[1] has been allowed to put somewhat unsuitable persons into high judicial office, where their relative incompetence causes injustice, blocks the lists of the Appeal Court, and lowers the prestige of the Bench; and the trouble is somewhat increased by the curious rule that the Attorney-General or Solicitor-General (the "Law Officers") are virtually entitled to demand appointment to the Bench when they want it. The Prime Minister, who is

[1] See the observations of Lord Hewart quoted at p. 35.

seldom a lawyer, is not the proper person to make such appointments at all, and must often find them distasteful; he is quite certainly subject to endless political pressure to appoint all sorts of unsuitable people, whether actually Members of Parliament or not, to these important posts. He often resists the pressure, but it is clear that Premiers have not always done so. And the Lord Chancellor, who has the bulk of the appointments, and who is doubtless often consulted about the others by the Prime Minister, is himself a political officer; it is clear, and praiseworthy, that the holder of this high office in the majority of cases strives hard not only to resist the pressure exercised on behalf of the wrong candidate but also to find really the best man. But it is also clear that there have been in the past a good many instances where political influence has had its successes, and even where purely personal relations have determined the destiny of judgeships. There is a well-authenticated story of one prime minister who, on hearing that a somewhat unexpected person had been elevated to the High Court Bench, remarked: "I did not know that fellow was related to the Lord Chancellor." By that time, a large number of that Chancellor's friends and relatives had been appointed to various posts in the judicature, and "that fellow" spent a quarter of a century on the Bench as a by no means satisfactory judge.[1] There is even a story, which may well be true, that the brother of one Home Secretary was appointed to the High Court by mistake. He had asked his brother to get

[1] There is no age-limit for the retirement of the judges of the House of Lords, Court of Appeal, and High Court.

him made a county court judge, and the brother, not realising the difference between the various kinds of judgeships, asked the Lord Chancellor to let him have the "next judgeship"; and the Lord Chancellor naturally obliged his colleague. From time to time, the legal profession has been shocked by the rumour that some relatively unsuitable person is likely to be moved up to the Bench, and a few of its more conscientious members have protested privately to those in high places, only to receive the answer: "We are as disgusted as you are, and we are trying to stop it; but there is strong political pressure and we expect to be defeated." And in due course the unsuitable person has become a judge, entrusted with the power to pass the death sentence, and to impose long terms of penal servitude on men over whose trial he has presided to the best of his ability. A story is told by Mr. Atlay, in his "Victorian Chancellors", Vol. II, p. 21, of Lord Brougham, "being pressed to some particularly flagitious job, and exclaiming: 'No, no! It won't do; it's only a fortnight since I made Johnny Williams a judge!'" Johnny Williams was an old friend of Brougham, and within 17 days of his appointment was securing himself a place of a sort in history by presiding at the trial of the Tolpuddle Martyrs.[1]

With regard to the promotion of the Law Officers, it might be thought that these will always be men of distinction and of a good knowledge of the law—that is indeed the defence often advanced for the payment of the very high remuneration that falls to them—but this is by no means the case. It is true that

[1] See pp. 232 *et seq.*

these offices are highly prized, and that few barristers would refuse them; but they are of course only given to lawyers who are also politicians, and in almost all cases only to lawyers who are actually already members of the House of Commons. This of itself severely limits the choice; and the Prime Minister who makes the appointment will naturally, and reasonably, select those who can debate well in the House of Commons. If a Government has one Law Officer who knows some law and is moderately good in debate, and another who knows no law but is really good in debate, it is well served, and no prime minister is going to pass over an efficient parliamentarian because he might ultimately make a bad judge. It has been quite common for both Law Officers to be markedly inferior not merely as lawyers but also as advocates to quite a number of their fellows at the Bar; indeed, at one time, a wit who was then standing junior counsel to the Government, when asked what his duties were, replied: "I take my brief, and sit behind the Law Officers whilst they state to the judge what they believe to be the law; and then I join—not too obtrusively—in the general merriment which follows." But all these indifferent Law Officers, if so inclined, will be promoted to the Court of Appeal or the House of Lords, where a very wide knowledge of law is essential; in extreme cases they will be an active hindrance and in the best a waste of money and space.

But far the most serious defect of the system of appointment of the superior judges remains to be mentioned. It springs from our whole political and economic system; it has its roots deep in it, ineradicable

so long as the system still lasts, and so much part and parcel of it that many people cannot even realise that it is a defect. It is that these judges are essentially middle-class. Their training, their upbringing, their education, their surroundings, their social circle, their financial circumstances, all combine to make them incapable of understanding the problems, the difficulties, the aspirations, the emotions, the vices and virtues, the temptations, often even the speech, of nine-tenths of the people who come before them. And when such people have done anything which seems to run counter to the judge's conception of stable society, it is not easy for the latter to form a proper estimate of the position. Strive as they may, and as many of them do, it is really not possible for them to bridge the gap between the "two nations" sufficiently to deal fairly and comprehendingly with some of the cases that come before them. (An illustration of the difficulty of persons of two utterly different classes in this deeply class-riven country understanding one another arose recently in an Assize court. The judge asked a workman: "When did this happen?" and received the answer: "In the dinner-hour." He could not understand the laughter that followed when he replied: "Can't you make it more definite? 'Dinner-hour' may mean anything between seven and nine.")

That is the measure of the difficulties and defects which attach to the system as it operates in England; but it is worth remembering that we are applying substantially the same system, with added or accentuated difficulties and defects to practically every

part of British India, the Crown Colonies, Protectorates, and Mandated Territories. Our peculiar procedure, and the whole spirit of our administration of justice, are operated in those areas, in substance on the same lines, but with many aggravations. In the first place, whether or not we think that our judges and lawyers in England are not good enough, it must be realised that, with very rare if distinguished exceptions, those in British India and the Colonies are necessarily inferior to those occupying similar positions at home. They have moreover immensely greater difficulties to face. With inadequate assistance, in bad climates, with few law books at their disposal, they have to deal with people whose habits, traditions, occupations, and—above all—languages are wholly strange to them. Language offers an especial difficulty. One has only to see the innumerable misunderstandings that arise in England when foreign witnesses give evidence through an interpreter to picture the position in most of our Imperial courts, where the judge will seldom adequately command even one of the perhaps many languages which will currently come before him. It is not uncommon in some territories for everything that is said to have to pass through two interpreters. The proceedings may be conducted in English. The questions will be put in English, and then translated by one interpreter into, say, Swahili, (there being nobody in existence, perhaps, who knows both English and the local language in which alone the prisoner and the witnesses can express themselves). Another interpreter, knowing Swahili and the local language, will then retranslate the Swahili

translation into the local language. The witness will make an answer in that language, which will be translated into Swahili, and that will again be translated into English. This will be written down as being the evidence of the witness, and the next question will then start on its linguistic journey. It is obviously impossible for any but the simplest question or answer to retain anything like its original shape in such an operation; but on what appears to be the answer to the question a man's life may depend.

One somewhat startling illustration of these difficulties occurred a few years ago. In a well-settled part of British India, certain men were charged with murder. The trial was conducted before a judge and five assessors, in the English language, and lasted some days. The prisoners defended themselves at great expense, and were found guilty and sentenced to death. They had a right to appeal, and they appealed, both on the merits, and also on the ground that, as they had discovered after the close of the trial, one or more of the assessors did not understand English. At the opening of the appeal, their counsel produced an affidavit to the effect that one of the assessors knew no English. The prosecution, with its own views of the importance of justice as compared to procedural technicality (or to winning one's case) objected to the affidavit on the ground that it was hearsay, and not direct evidence. The Appeal Court upheld the objection. The appellants made further efforts, and obtained an affidavit proving directly and conclusively that at least one of the assessors knew no English.

The prosecution, consistent in its views above-mentioned, objected to the production of the affidavit, this time on the ground that it came too late, the argument having lasted for four days already and being very nearly finished. The court again upheld the objection, dismissed the appeal, and confirmed the sentences. Thus far, we have the spectacle that two British courts were willing, the one to try men and sentence them to death without first ascertaining whether the assessors who had to judge the facts understood the language in which it was electing to hear the case, and the other to refuse on technical grounds even to enquire whether such an outrage had taken place, and to confirm the sentences.

The full facts as now known were that two of the five assessors knew no English, and one more did not know enough to follow the proceedings intelligently; and the position at that moment was that the prisoners had gone through a long trial before a tribunal that in effect did not even know what was going on, that an appellate court had refused to enquire into that somewhat startling injustice, that they lay under sentence of death, and incidentally that they had exhausted all available funds. Their only remedy in the world was to apply to the Privy Council for special leave to appeal, which is not only an expensive procedure, but one which seldom meets with success, for leave to appeal to the Privy Council in criminal cases is very rarely given, being practically confined to cases where it is plain that a miscarriage of justice of an altogether exceptional character has taken place. This limitation is undoubtedly due to a well-founded

apprehension that, if ordinary miscarriages of justice were to be entertained, the volume of work would be overwhelming; and it seems universal that whenever serious money interests are not involved, but merely justice, our governing class will not tolerate the expense of providing adequate judicial machinery. The same phenomenon can be observed in England in connexion with County Court appeals[1] and criminal appeals,[2] and legal aid to the poor.[3] Happily, in this case, the prisoners were fortunate enough to find solicitors and counsel in England who were ready to act for them without reward—and there is no real reason why lawyers should work for nothing—; and of course the Privy Council when the facts were placed before them said at once that the circumstances certainly called for the exercise of their rarely-exercised right to give leave to appeal. The appeal itself had then to be conducted, normally a still more expensive matter; but again it was conducted free of charge, and of course it succeeded. The boldest upholder of our perfect legal system will perhaps pause for a moment before he says: "Oh! Well! They were probably guilty anyhow". But the sequel is interesting. The Privy Council, when allowing the appeal, made it clear that in their view there had really been no trial at all, and that the prisoners could lawfully be put in peril again in a properly conducted trial; and the prosecuting authorities in British India thought it right to continue to prosecute. This time the case was properly conducted, and the prisoners were acquitted.

[1] See p. 107. [2] See pp. 129 30. [3] See p. 151.

A good deal of light was unexpectedly thrown on the inner working of the judicial system in England by a debate which took place in the House of Lords in December, 1934, and which led, oddly enough, to a deterioration in the standard of manners and mutual criticism as between the various judges in some of the Crown Colonies, who thought apparently that if the most eminent of British judges could freely criticise one another in public they themselves need not exercise too severe a measure of self-restraint.

In this debate, on the 11th December, 1934, the then Lord Chancellor, Lord Sankey, moved in the House of Lords the second reading of a Bill which had two main objects, expressed in two clauses. The first was to add two judges to the strength of the King's Bench Division of the High Court, bringing the strength to nineteen, to deal with arrears in that Division. The appointment of judges to fill subsequent vacancies, so long as the strength was not under seventeen, was however to be subject to the proviso that the vacancies were only to be filled if Resolutions were passed by both Houses of Parliament representing that it was necessary to fill them. This is a procedure which has been in use for some years.

It should be mentioned, also, that shortly before the introduction of the Bill a Royal Commission was appointed to enquire into the state of business in the King's Bench Division of the High Court and to report what could be done to expedite litigation and to prevent arrears accumulating. Substantial delay

in hearing cases in that Division had been almost continuous for many years.[1]

The second object of the Bill was to create an office of Vice-President of the Court of Appeal. Usually the Court of Appeal sits in two divisions of three judges each, one presided over by the Master of the Rolls, and the other by whichever of the five Lords Justices of Appeal is the senior in time of appointment, so that the effect of the proposal was that the Lord Chancellor would be enabled to select one of the Lords Justices to preside in the second division, and thus to deprive the senior Lord Justice of the position *to which he had previously been entitled. There was* a widespread belief in the profession that this proposal was put forward with the intention of depriving Lord Justice Slesser, an excellent judge and then the second senior Lord Justice, of the right to preside when he became the senior.

As soon as the Lord Chancellor had concluded his speech on the Bill, Lord Hewart, the Lord Chief Justice, who ranks next after the Lord Chancellor among the judges of England, rose and made a somewhat sensational speech. He said that he found it necessary to say "a few very plain words". "On November 23rd of this year", he said, "there was sent to me, not by the Lord Chancellor but by a secretary, a letter. I have had experience of five Lord Chancellors now. The others used either to write to me or at any rate to sign the letter, but now it is always from a secretary, and the answer in future will be from a clerk. On November 23rd I got a letter from a

secretary, saying that it had been decided that a certain inquiry should be conducted by Royal Commission, the terms of reference to which and the members of which were shown on the two accompanying slips. . . . I was not consulted for one moment as to the terms of reference or upon the members of the Commission. And I may remind you that I am not speaking for myself. I happen to be the Lord Chief Justice of England, and I have to think of my office, and of my successors for ever. Not one word was said to me either upon the terms of reference or upon the members of the Commission. . . .

"That Royal Commission having been appointed behind my back, this Bill is drafted. Now you would have thought, would you not, that as a mere matter of ordinary courtesy the Lord Chief Justice of England would have been given an opportunity of seeing at any rate a draft or a proof of the Bill, or would have been told what the Bill was going to contain? Not a bit of it! This is Tuesday. I came out of my Court last Friday afternoon, and my invaluable clerk, who had happened—merely happened!—to look through the papers delivered to me, not as Lord Chief Justice but as a member of this House, said: 'Here is a document which I think you ought to read', and it was this Bill. . . . And it was in this purely accidental fashion, at the eleventh hour, that I was made aware of the existence of this Bill."

Lord Hewart then proceeded to discuss the provisions of the Bill itself, and with references to the proviso requiring an address of the two Houses for filling vacancies, he said:—

"When I was Attorney-General and in another place, in happier days, I protested against a similar clause in a Bill of that day. I was told . . . that without the proviso . . . the Bill would never get through. 'Why not?' I asked, 'Because', I was told, 'the Labour Members will object.' Nothing could have been more untrue. When I had moved the Bill in the House of Commons on that occasion—I shall never forget it—one Labour member got up after another, not to complain of the additions but to ask if we were doing enough."

Lord Hewart then described how he had protested to the then Lord Chancellor, Lord Cave, "who was not only a distinguished judge, but a trustworthy colleague", against such a proviso, and had received a promise that it should never appear again. He went on to speak further of the proviso:

"What are the objections to it? They are twenty. At this hour I will mention two. The first is that it puts into the hands of the Government Whips the decision from time to time of the question what shall be the composition of the King's Bench Division—in my opinion an intolerable situation. The amount of intrigue, the amount of tacit rebuke or encouragement which that fact renders possible, is something which I cannot describe, but I know it—I know it. . . .

"Let me add this further. What I am saying now about this proviso, and what Lord Cave agreed with me about it, I communicated to the Lord Chancellor before this Bill was drafted. What the Lord Chancellor intended to say I know not, but I went away with the impression that the proviso was dead. Imagine my

surprise when on last Friday afternoon I found the very same proviso in this Bill."

Lord Hewart then examined the second clause of the Bill, dealing with the appointment of the Vice-President of the Court of Appeal, which he suggested was "an interpolation, an after-thought". After describing the normal composition of the Court of Appeal, and the practice as to the senior Lord Justice presiding in the second division, as given above, he continued:—

"Let me tell the House what happened. Lord Justice Slesser is a judge in whom I, at any rate, have complete confidence: a scholar, a lawyer. . . . The other day, within the last fortnight, he came to me—he permits me to say this—in a state of agitation. He told me that he had been informed by the Master of the Rolls that he was not to preside in Appeal Court No. 2, but that lest he should preside the composition of Appeal Court No. 1 and Appeal Court No. 2 would be varied, contrary to the practice of the past sixty years. Lord Justice Slesser came to me . . . as the permanent head, while I live, of the Judiciary in this country as distinguished from the political head. He came to me for my advice. I said that I could not advise him. . . . 'But', I said, . . . 'I can tell you what I would do if I were faced with any such menace. I should decline to sit. I would not retire, but I would decline to sit.' He thanked me for my advice, and he wrote accordingly to the Master of the Rolls.

"There followed silence. The next chapter of the story was this Bill, which . . . enables the Lord Chancellor to appoint to be Vice President of the Court . . . any one of the Lords Justices of Appeal

who shall preside when sitting—that is to say, the Lord Chancellor or one of his secretaries, or the secretary of one of his secretaries, by a stroke of the pen or a telephone message to me or somebody can say: 'The person to preside in the second Court of Appeal is so-and-so.' Why?"

At the end of Lord Hewart's speech Lord Hanworth, the Master of the Rolls, said: "I think I should best consult the dignity of this House and the dignity of the Judiciary and my own by not replying to the general observations which have fallen from the Lord Chief Justice, but upon one question of fact I must say a word. Let me repel . . . the suggestion that I had anything to do with the genesis of Clause 2. . . . It is not an interpolation in the Bill by me; it is not a late interpolation in the Bill. The reason I spoke to Lord Justice Slesser was that the Lord Chancellor had told me the clause was in the Bill. . . . The suggestion that the learned Lord Chief Justice knows the facts and has told them to the House of Lords makes me rise in order to say that he has not ascertained the facts. I should have thought that perhaps as an old friend he might have asked me whether or not I had anything to do with Clause 2."

The debate was adjourned, and resumed on the 14th December, 1934, when the then Lord Reading mentioned the suggestion that had been made that Clause 2 of the Bill was intended as an attack on Lord Justice Slesser because he had been a Labour Law Officer and had been appointed by a Labour Government; this suggestion he dismissed as "inconceivable". On this Lord Ponsonby said:—

"The noble Marquess" (Lord Reading) "said—and this is the one point upon which I disagree with him—that the suggestion that it was from a political motive was inconceivable. It is not at all inconceivable. This is a disagreeable subject, . . . but if anybody supposes that holding Labour views does not lay one open to social and professional ostracism, he is making a great mistake. Plenty of examples could be given; I could give some personally. But we do not want to enter into that, we only want to say that it is a well-known fact, and that if the public outside this House are accepting Clause 2 of this Bill in that way, it is nothing to be surprised at.

"I have intervened because I recognise, however hotly it may be denied—and they always hotly deny these aspersions on politicians—that my colleague in the Government of 1924 has suffered, and is suffering now, for his political views. There can be no other reason."

Lord Hailsham, who had previously been Attorney-General and Lord Chancellor, then intervened and referred to Lord Hewart's account of his having moved a Bill in the House of Commons for an increase in the number of judges, with the proviso to which he objected, and having been followed by a number of Labour members supporting the proposed increase. He demonstrated from the records that Lord Hewart had not moved such a Bill, never having been a member of the House of Commons when any such Bill was introduced. Lord Hewart had, however, in the House of Commons twice moved the resolution for an address asking for extra judges under the terms of the proviso, and on this point Lord Hailsham added:

"On the two occasions when he moved the Resolution there was no such incident of one Labour member after another getting up and asking if we were doing enough. . . . Even a Lord Chief Justice is not always accurate in his recollection."

Then Lord Sankey, the Lord Chancellor, replied to the speech of Lord Hewart. He said:—

"The speech of the Lord Chief Justice . . . took me entirely by surprise. It amazed me. I had no notice of what the Lord Chief Justice proposed to say. He never communicated with me, and I had not the slightest idea of the attack which he was going to make. I regret that he did not even give me five minutes of his invaluable time, when very much of this debate might possibly have been avoided. And yet—I say it in all sincerity—I am extremely glad that the Lord Chief Justice did intervene. During the last three or four years we have had numerous Bills in this House dealing with reforms of the law. . . . We have not had the assistance of the Lord Chief Justice on any other occasion. He has never been here. . . . He is one of the most brilliant advocates of modern times, and even now at times he cannot forget the advocate. I could have wished, however, that his speech the other night had been rather more temperate in tone, and that he had been a little more careful in his facts. . . .

"The Lord Chief Justice complains that he has been treated with discourtesy because he was not informed of the particulars relating to the Royal Commission, or of this Bill, until a late date. The date given was November 23rd. . . . Let us now come to the facts,

on some of which possibly the Lord Chief Justice's memory has failed him, although I am clear in my mind, and I have documentary evidence, some of it in the handwriting of the Lord Chief Justice himself, to show that he was kept informed and consulted from the earliest possible moment and not as late as November 23rd."

Lord Sankey went on to give details of a letter written on the 25th October, 1934, conveying to Lord Hewart the decision of the Cabinet as to appointing additional judges and as to the holding of the proposed enquiry, which had been made on the previous day, and to state that at his request the Lord Chief Justice had called upon him during the following week and that they had discussed both the question of the additional judges and that of the Commission of Enquiry. He went on: —

"The charge against me is that I did not tell the Lord Chief Justice what was going on. Within half an hour I told him. Within a couple of days I saw him. There is the letter. I hope I shall keep calm, but it is not my habit to be discourteous, and I am not going to sit down under a charge of discourtesy. I gathered that he did not wish to have anything to do with the enquiry at all. What is the use of discussing the future with a man who says that?"

He then turned to the question of the clause dealing with the Vice-President of the Court of Appeal, and said that so far from it being an afterthought or an interpolation it was the first part of the Bill to be drafted. At the end of the discussion, some measure of peace was established between the contending parties,

but the whole episode threw a somewhat unfortunate light upon the position of the heads of the judicature.

Turning now to the work done by these Courts, their jurisdiction can be stated shortly. In the High Court, substantially all civil cases involving over £100, and some under, are heard; in the Appeal Court, appeals from the High Court and County Courts; in the House of Lords, appeals from the Appeal Court and from Scotland and Northern Ireland; and in the Privy Council, consisting substantially of the same judges, appeals from the Dominions and Colonies.

When one turns to the County Court judges, appointed by the Lord Chancellor, and Recorders and Stipendiary Magistrates, appointed by the Home Secretary, the position is not very different from that of the superior judges. County Court judges have until recently been paid £1,500 a year, and now have £2,000. They are very rarely promoted to judgeships in the High Court, and have of course to give up their practice as barristers; having regard to the scale of earnings at the Bar, it is only a few of the best men who will take these appointments, but there is in truth a wide range of barristers, only moderately successful in practice, who possess the qualities necessary to make good judges, and not a few of them are made County Court judges. At the same time, political and personal pressure in some instances has succeeded in elevating to the County Court Bench as a haven of rest and security second-rate political workers or impecunious friends of great men. The County Court judges have the duty of hearing substantially speaking all civil cases under £100, all "rent-restriction" cases, and

all Workmen's Compensation cases; the immense social importance of their work is obvious, and it is only fair to say that quite a large proportion of them sympathise with the difficulties of the poor and even go a long way towards fully understanding them.

The Stipendiaries, whose salaries correspond in London with those of the County Court judges, and vary from about £800 to £1,500 in provincial towns, are again whole-time appointments, and questions of influence play about the same role as in the case of County Court judges. They do the work of justices in police courts, but do not normally sit at Quarter Sessions. The Home Secretary no doubt does his best to appoint good men, subject to the usual difficulties of political pressure, but it would probably astonish the profession to learn that any knowledge of criminology on the part of the appointees had even been made the subject of enquiry. A friend of the writer was once engaged in finding a suitable secretary for a charitable organisation, and one of the applicants was an ex-cavalry officer of good family, who had been called to the Bar. Asked if he was interested in the problems of the poor, he replied: "Heavens, no. I don't understand the poor, and I don't like them. But I feel that on the salary you offer, plus my other income, I can get on nicely for a few years, and then I think I can get appointed as a Metropolitan stipendiary."

Recorders stand in a somewhat different position, for (apart from the Recorder of London) they are only part-time servants, and continue their practice at the Bar. Some few of the recorderships carry salaries round about £1,000 per annum, but most of them are

quite small. They sit normally only four times a year, for a week or two in all. The appointments are sought after either from motives of prestige or vanity ("Small titles and orders, for Mayors and Recorders", the jingle runs) or as a small addition to income, and it is unlikely that real fitness for the post has much to do with the appointment, except at times in respect of one or two of the larger recorderships, which are often held by able and prominent men. Nevertheless, these officers perform the same work as justices in Quarter Sessions, and can at any rate claim to know some law.

How these various courts do their work is the subject of another chapter.[1]

One might well ask of the extraordinary magisterial system described above, why is it tolerated? Untrained, and yet dealing with most difficult and technical work; in need above all of impartiality, and selected mainly for politics, of which bias is as much an essential part as it is of a bowl; owing a duty to hear out cases patiently, and yet unpaid and often only too obviously anxious to get rid of the court's list and get back to the earning of their livings, the enjoyment of their blood sports, or the management of their estates; why have they not long ago been swept away? The answers are various, but they all spring from the class system. In the first place, they are cheap, and one should not waste money on what are mostly poor people. Then, just because they are unpaid, it is easier for the governing class than for any other class to take on the work. In most cases, too, they can

[1] See Chapter V, pp. 90 *et seq.*

be relied upon to possess, consciously or unconsciously, the right class bias. Moreover, in courts which have so much to do with the maintenance of "loranorder", the rough and ready methods of the untrained justice are much more efficient from an executive point of view. Impartial and well-trained professional judges would not merely acquit the innocent; they would acquit all those whose guilt was not clearly proved. It is a very real convenience to the police and the Government to have courts which take a "broad" view, and are ready to convict men whose guilt is not established because they think that they know them to be "ringleaders", "fomenters", or whatever other label is fashionable at the moment. A system of properly trained justices drawn from all classes of the people would be expensive, much more just, (and consequently much more bother to the police), and much freer of class bias. Such bias is important to poaching cases, still more important to industrial or political cases, and absolutely vital when real unrest begins.[1]

The very badness of the magistracy thus provides one additional obstacle to its reform, that any real improvement would be actually unwelcome to an executive which wants to keep all its weapons sharp for times of trouble.

An additional disadvantage of great importance is not always realised. It is that the poor quality of these courts is peculiarly productive of injustice when they are dealing with laws that are at all difficult to apply. The evil would be lessened if the law were kept easy

[1] See pp. 281–4.

and simple; but in practice the legislature is continually laying upon the magistrates, without realising their limitations, all sorts of difficult functions which they are unfitted to discharge properly. For example, when questions involving intention arise, as in charges *of trespassing in pursuit of game or loitering with* intent to commit a felony, the magistrates are generally at their worst and much injustice must be done by wrongful convictions, in particular in relation to "loitering with intent". There are times and places where it becomes dangerous for men with past records even to walk slowly, let alone to stand still, since some of the police will take unfair advantage of the fact that magistrates will easily convict in such cases. The statistics of recent years of the increasing numbers of charges of this offence, and of the increasing numbers of men acquitted even by the existing courts are disquieting:

	Numbers of Charges	Numbers of Charges Withdrawn or Dismissed
1930	2,398	623
1931	2,797	732
1932	3,905	1,147
1933	4,154	1,228
1934	4,834	1,449

There are times when this inefficiency of the magistrates may virtually hold up important and valuable parts of that public control without which the capitalist operation of society would become so intolerable as to shock even middle-class opinion. A well-known

example of this is to be found in the Factory Acts. Unless these Acts are enforced with constant vigilance, workmen will be maimed and otherwise injured in even greater numbers than they are; and the main method of enforcing the Acts is by prosecution of the offending employers before magistrates. Only too often, the magistrates, consciously or unconsciously resenting legislation which interferes with the freedom of profitable exploitation of workmen by their own class, will refuse to convict in the plainest cases. Their activities or rather inactivity in this respect has been criticised from time to time in the courts. In October, 1937, the Lord Chief Justice, dealing with a plain case of an offence in connection with unfenced mill-gearing, where the magistrates had nevertheless not convicted, said: "This case illustrates the mischief which arises when a prosecution under the Factory Acts has to be conducted before a bench of lay justices. How long that system is to be allowed to continue is a matter requiring grave consideration. This case illustrates the blunders with which, to my knowledge, this Court has been dealing for 16 years."

A week later, the same judge, dealing with a similar case of magistrates, observed:—

"This is the kind of case which almost makes one despair. I am frequently tempted to comment on the behaviour of some lay magistrates when they are trying Factory Act cases. They give the 'go-by' to the plain meaning of the statute, come to contradictory conclusions, and arrive at an opinion against the prosecution. In the last 15½ years I have had so many of these cases, in which the same fallacy and the same

blunder are cheerfully repeated, that I am coming to the conclusion that sooner or later somebody will have to propose a clause in an Act of Parliament which will provide that all prosecutions under the Factory and Workshops Acts must be dealt with by justices of legal training and independent position.

"In this case the justices have flatly contradicted themselves, and have come to a conclusion which but for the respect we have for all justices I should describe as grotesque."

It is amusing that the "cheap and bad" justice of the police courts, the hardship of which on the poor has been borne with equanimity by the middle classes for so long, is now gradually becoming menaced by the growing indignation of motorists. When they listen to police officers parroting accounts of incidents in which they themselves have taken part, so that they are able to form for themselves at any rate some estimate of their gross inaccuracy, and then find that the magistrates are swallowing them as if they were true, they may not realise that this is what the working class has been enduring for centuries, but they do at any rate use extremely strong language and become likely supporters of some measure of reform.

CHAPTER II

JURIES

JURIES ARE MORE important than is commonly thought. They sit in all criminal cases tried at Assizes or Quarter Sessions, and in a certain or uncertain number and variety of civil cases in the High Court, particularly in cases of fraud or libel; they sit only rarely in County Courts. Their function is to try questions of fact, after being given guidance or "direction" as to the law from the judge in his summing-up. The judge is of course entitled to express opinions to them on the facts, but it is for them and them alone to decide the facts. Their decision is rendered in criminal cases by simply finding a verdict of Guilty or Not Guilty; they have nothing to do with sentences. In civil cases they may find simply for the plaintiff, with damages, or simply for the defendant, but they are very often asked to answer a series of questions in order that the points of law which may arise on their findings of fact can be argued in a clearer light.

At first sight, one could hardly imagine a more unsuitable tribunal. Twelve persons gathered together haphazard with no training and no explanation of their duties, sit cooped up in a wooden box, longing to get back to their own work; they listen as best they can for hours and often for days to the evidence and the arguments on law and fact, and are then shut up in a room together and told to arrive at a verdict. They are not even told that they have to be unanimous.

The law has so much confidence in them that it entrusts them with the most important questions to decide, including in cases of murder the question of life or death, since, although they have nothing to do with the sentence, death is the only sentence for murder. And at the same time the law has so little confidence in them that it has erected a vast and almost incomprehensible set of rules of evidence, scarcely paralleled by anything in any non-British system of law, designed mainly to prevent them from hearing all sorts of things concerning the case which any laymen would think most helpful but which experience has shown to be apt to prejudice juries and lead them to wrong verdicts.

Juries have a spurious reputation for intelligence. More than half of the practising barristers praise them in public; more than three-quarters will privately condemn them as uncertain, irresponsible, and prejudiced. Probably their only virtues are that by their presence they do prevent barristers being too technical in their arguments, and that they occasionally bring a greater knowledge of the world to bear on a case than the judge himself might do. Supporters of the system maintain that juries provide a real safeguard for accused persons, and acquit a certain number who might be found guilty by judges, but most experienced lawyers hold that they often convict men whom judges would certainly feel bound to acquit. In civil cases, and from time to time in criminal cases too, they cause endless anxiety and expense by finding it impossible, naturally enough, to arrive at an agreement as to their verdict, so that the whole case has to be tried over again.

Perhaps it may be fairly said that, in respect of cases having no flavour of politics, in the broadest sense of the word, juries are on the whole a minor evil, occasionally deciding disputes of fact better than a judge alone would, but more often worse. But so soon as one enters the field of politics, and especially of the expression of political or economic views not generally popular, they present a major obstacle to progress. And, as so often happens in England, it is just at the point when they are most dangerous that their reputation stands highest. Well-meaning old gentlemen holding positions of great responsibility describe them as bulwarks of our liberty (without of course knowing much about bulwarks or anything definite about liberty). Juries gained this reputation in the eighteenth century, in which there was a period when the executive government was more reactionary than the general body of the class from which juries were drawn, and juries were accordingly delighted to present them with verdicts in favour of defendants and against the encroachments of government. It is pretty clear that juries can be relied upon, even in defiance of the law, to acquit those unjustly prosecuted when *and only when* they are really the "peers" of the accused. As Mr. Justice Evatt of the High Court of Australia has written of the Tolpuddle case, "Injustice within the Law", pp. 128–9. "Lawyers should always have a particular interest in the affair. In one sense the case represented the very coronation of injustice, and yet there was no technical breach of the law. A jury consisting of the labourers' real peers, not of their bitter opponents,[1]

[1] The jurymen were all landowners or farmers.

would certainly have acquitted them; even then a London jury would have acquitted." Mr. Justice Evatt quotes a speech by the Bishop of Goulburn, N.S.W., as follows:—

"The jurors represent the community to which the accused person belongs. It (i.e., the jury system) is a method by which the community seeks to express its judgment on the conduct of its members. It is not primarily a question of interpreting the law, the jurors need have very little legal knowledge, it is a matter of sensing the justice of the case. This can only be done if the jurors belong to that section of the community to which the accused person belongs. They must have an understanding of his mind and motives, feel the same sort of emotions as possess him, if they are to give an intelligent and just decision on the evidence presented."

In a fashion not uncommon in England, juries have kept their reputation as defenders of popular liberty long after they ceased to merit it, and they will only merit it again if similar circumstances recur, that is, if men seeking liberty and so coming into conflict with the executive, the dominant class, are once again truly tried by their "peers", by juries drawn from sections of the community more progressive and enlightened than the government. The present position is really terrible. The law seems designed to secure that juries shall be drawn almost entirely from the middle and lower-middle classes, the very sections of the community most impervious not merely to new or unpopular ideas but even to the notion that such ideas ought to have a hearing.

The general qualification for jury service is that you must be a natural born British subject, of either sex, between 21 and 60 years of age, and that you must, outside the City of London, be either

(1) a resident beneficially possessed of £10 a year in real estate or rent-charge; or

(2) a resident beneficially possessed of £20 a year in leaseholds held for not less than 21 years, or a lease for lives; or

(3) a householder residing in premises the net annual value of which according to the valuation list or for income tax purposes is not less than £30 a year in Middlesex and the County of London, or £20 a year in other counties.

There is in all probability also (the law is not clear) a further possible qualification, viz., residence in a house having fifteen windows. The Window Tax having long ago been abolished, this qualification is certainly not observed in practice.

(In the City of London, you must be a householder or occupier of a shop, warehouse, etc., or offices for the purpose of trade or commerce within the City *and* must have lands, tenements or personal estate of the value of £100.)

There are a number of exemptions, including peers, members of the House of Commons, priests, practising barristers and solicitors, and officers and men of the Army, Navy, and Air Force.

Lists are prepared of all persons qualified and not exempted, and from those lists the panels of jurors to

be summoned to sit in the various courts are selected haphazard. The jurors thus qualified supply all the juries for criminal trials at Assizes and Quarter Sessions, and also for civil cases tried by "common juries" in the High Court or at Assizes; but so far as civil cases are concerned it should be remembered that in any case where an order for trial by jury is made either party if he chooses to incur an expense of £12 12*s.* can insist on a "special jury", the additional qualification for which is that you should be either of a higher degree than an "esquire", or should be legally entitled to be called "esquire", or should be a banker or merchant, or should occupy a private dwelling-house appearing in the valuation list at not less than £100 a year in towns of 20,000 population and not less than £50 a year elsewhere, or should occupy premises other than a farm, appearing in the list at not less than £100 a year, or a farm of not less than £300 a year.

It is not difficult to see from the above provisions, especially when it is remembered that the value appearing in the valuation list is usually substantially below the true rental value, that for the purpose of criminal trials the working classes are largely excluded from jury service and that for the purpose of civil trials, which are often of some political importance, it is possible by demanding a special jury to ensure practically an upper-middle-class jury. In actual practice, it is extremely rare to see on any jury more than one or two persons of working-class outlook. Jury service would of course be a considerable personal hardship to working people, as it sometimes is to the middle

class,[1] but there can be little doubt but that, if juries were commonly working-class in sentiment, many cases would be decided differently, many cases now brought would never be brought at all, and many not now brought would be brought. It can indeed be said that in the majority of cases the result and indeed the object of the operation of the jury system is that men should not be tried by their "peers".

It is a commonplace of litigation to-day that on any question of Socialism or Communism, pacifism or anti-imperialism, or any deviation from the hypocrisy of the ordinary sexual code, a jury will present about the same undeviating obtuseness as might be found in the smoking room of a suburban golf-club. No one who has had anything to do, either from the right or from the left, with the conduct of cases, civil or criminal, where political issues are involved, entertains much doubt on this point. The results are already more serious than the casual observer would imagine, and as often happens they express themselves (especially in civil cases) as frequently in the fact that cases are not brought at all as in the results of cases that are brought. In practice, it already means that right-wing writers, if so minded, can attack Socialists or Communists in a manner which if justice were impartial would lead to an award of damages, and that the legal advisers of the parties attacked feel bound to tell them that their prospects of success before a jury are negligible; whilst on the other hand left-wing writers have to be advised

[1] Special jurors are paid £1 1s. per case, but other jurors are paid only 1s. for each case, they all have to meet their own travelling expenses.

that what they want to publish of the right-wing is not in real truth defamatory, but that a judge might rule that there was evidence for the jury to consider and that the jury would certainly award heavy damages if they had the chance. In the criminal sphere, too, it means that the Government can feel tolerably certain of a verdict in any case that is not too weak, if the accused are known to be Communists or otherwise to hold left-wing or other unorthodox views. That is the point at which juries stand now, in a period of outward calm; nothing is likely for the time being to make them any better, and they will probably grow progressively worse; and when the general political position becomes acute, as it is bound soon to do, they will pass from being merely an unsatisfactory part of the judicial system to the position of an important executive weapon. And all the while, bless them, many of them will still think that they are quite impartially giving, in the words of their oath, "a true verdict according to the evidence". Sweet are the uses of myopia.

CHAPTER III

LAWYERS

LAWYERS IN ENGLAND are numerous. Like other classes, they have their virtues and their defects, and present an infinite variety of talents and moralities. They are neither as bad as the working classes believe, nor nearly as good as the middle classes imagine.

They are rigidly divided into two classes, barristers, often called "Counsel" or collectively "the Bar", and solicitors. Barristers spend most of their time conducting cases in court or reading briefs in order to prepare themselves for conducting them, but they do a certain amount of advisory work, both in the early stages of preparation of cases, and independently of actions altogether; indeed, barristers practising in "Chancery"[1] often spend most of their time in advisory work or drafting documents, and some of them rarely go into court. Solicitors, who alone come into direct contact with the client (he cannot even see his barrister without the solicitor) do all the work that barristers do not do. They take the client's instructions, carry through practically the whole of an action except the actual conduct of the case in court, and in addition do a very large volume of advisory and administrative work (conveyancing, drafting, wills, settlements, management of estates, and many other activities) which does not lead to litigation at all. They also in some cases do a good deal of court work; for although

[1] See p. 59.

they have, in general, no right to appear in the Supreme Court, the House of Lords, or at Assizes or Quarter Sessions, they may practise in County Courts and Police Courts, and often have large court practices, especially in the country.

Solicitors are commonly called the "lower branch", and are not eligible to be appointed as judges (except as registrars of County Courts); but their training and qualifying examinations are both longer and more severe than are those of barristers. The reason for this is mainly that, as they come directly into contact with the public (the "lay clients") it is necessary for the protection of the latter that their qualifications should be high; and, of course, as general practitioners, to borrow a comparison from the medical profession, they have to have some knowledge over a wider range than a barrister need in practice command. A barrister can qualify in $2\frac{3}{4}$ years, and indeed, if he passes his examinations with distinction, in $2\frac{1}{4}$ years, in comparison with the solicitor's five years. The examinations for call to the Bar, whilst they grow a little more difficult as time goes on, are still pretty easy and do not cover a very wide range. The reason is partly that a barrister expects to learn his profession mainly in practice, either by watching other and more experienced men or by himself trying to conduct cases, and that it is not thought necessary to use examinations and qualifications to protect the public, since the intervention of the solicitor should be sufficient protection. There is also probably some ground for supposing that the examinations are kept a little simpler by a reluctance to interfere with a long-established custom

among the upper classes to let their sons be called to the Bar as a sort of minor distinction, without any intention of practising; it is necessary, if this custom is to survive, to be a little tender towards the extremely modest intellectual level of this section of the community.

The educational qualifications demanded both of solicitors and barristers, like those of other professions, are twofold, general and special. In each case, evidence of a good general education is demanded, and then the examination of the governing bodies (the Law Society for solicitors and the Council of Legal Education for barristers) must be passed. These latter are devoted exclusively to law, except that solicitors have to pass in one or two non-legal subjects, like book-keeping, which are necessary to the proper management of their business. The result is that neither branch of the profession will normally learn any criminology, sociology, psychology, or economics. They are in general well-educated in the conventional sense, and have sufficient working knowledge of the law. Thus all that they lack is the additional education which would enable them to understand a little better the nature and the difficulties of the mass of the population.

Solicitors, in the country, will generally deal with all kinds of work; in London and one or two of the larger towns, they will specialise in one or two branches; one will do mainly shipping or insurance work, another banking; many will deal mostly with companies; some will devote most of their time to litigation in the High Court, whilst others will shun it. The younger or smaller firms may give much of their time

to county court, or police court, or criminal work generally.

Barristers will tend to specialise rather more. To start with, they will fall, not by any rule or restriction, but as a matter of practice, into one or other of two big groups, of historical origin, viz: Chancery and Common Law. The Chancery barrister will deal with companies, partnerships, estates, wills and settlements, conveyancing, copyright, specific performance of contracts, injunctions, and other matters which were originally dealt with in the old Chancery or Equity Courts. The Common Law barrister will deal with most matters of contract, civil wrongs (libel, slander, negligence, trespass, and so on) and with criminal work. Other and smaller groups, more specialised, will deal with patents, divorce, admiralty, and one or two other fields. The work in County Courts, as in Police Courts, and at Assizes and Quarter Sessions, falls to the Common Law barristers. The next stage is to specialise gradually in one branch. Some barristers will specialise in criminal work; others will give up criminal work as soon as they have enough civil work to keep them going; and only a few (often a distinguished few) will continue for long to do both. Naturally and inevitably, in the age in which we live, it is very rare indeed for a barrister or solicitor to select the work he would prefer on any ground of social value; he will normally choose the most lucrative, with a bent sometimes, in the case of barristers, towards the field which he thinks most likely to help in promotion to the judicial Bench. One result of this is that on the whole and with some striking exceptions, the

criminal work (far the most important from a social point of view) remains in the hands of the inexperienced or of the not too efficient, for there is less "money" in that than in most other branches of the work, and the more proficient gravitate towards the greater profit. Poor men's litigation suffers in the same way.

It is now time to consider some of the defects and virtues of the lawyers. Their fundamental defect is of course that they are all middle class; true, about 5% of them are of working-class origin, but they have found it necessary, and only too easy, to put on the outlook of the middle class with their clothes, their habits, and their speech. We thus have here too the phenomenon that we find in nearly every branch of activity where the middle classes are prominent—the legislature, the Bench, the professions, the services—that the needs, the wishes, the hopes, the points of view, almost the very existence of seven-eighths of the community are not so much misunderstood as simply forgotten or ignored.

But apart altogether from broad and fundamental questions of class, there are a good many accusations commonly levelled against both branches of the profession, which are worth considering. They are of course accused of overcharging. Overcharging is relative, and in comparison with the earnings of the bulk of the population the charges of lawyers must seem terribly high; but in comparison with professional remuneration generally the charges are not high, except in a few extreme cases where the "rent of ability" reaches startling figures, as it does in the case of boxers, film stars and the Royal Family. And

that is just inevitable under Capitalism. What makes the charges seem high is in part the multiplicity of the lawyers engaged; in a case of any size, each side will have not only a firm of solicitors but also two barristers, a "K.C." and a junior.

The next most grave charge is that of giving away the client to the other side; one can well understand this suspicion arising in the mind of the litigant who feels the justice of his case and suddenly hears his solicitor and barrister telling him that it is a difficult case and that he will be well advised to accept half the amount he claims, by way of settlement. But experience shows that anything in the nature of sacrificing a client to the other side for some ulterior motive is a comparatively rare fault in the profession, even among the less reputable members. The nearest to any such fault that is ever likely to be found is a certain reluctance to hit hard when the solicitor or the lay client on the other side is an important person who can be of great value as a client, and even that is mercifully rare. Another grave charge is that of encouraging clients to fight cases which they are unlikely to win, or which they could easily settle, in order to earn costs and fees for the lawyers. Now, so long as the profession is so organised that honest advice not to sue, or to compromise, is rewarded by a guinea or two, whilst a little elasticity of optimism will lead to the action proceeding and to the earning of several hundred guineas, so long will a grave temptation be present, and some lawyers will succumb to it. Cases, occasionally flagrant cases, of this defect have come under the notice of most lawyers; but it is not so

widespread as many critics think. There are of course lawyers who think that they are entitled to levy a certain definite tribute on the community, and their point of view is well expressed in the apocryphal story of a great law-suit over a will, in the Chancery Court. The hearing had just started, and was confidently expected to engage the attention of some six counsel for three weeks or more, when the doors of the court suddenly opened, and everyone streamed out into the corridor. One elderly chancery counsel was seen to be greatly affected, and had to be taken to one side and given restoratives. When he came round, his first words were: "Settled! Settled! Think of it! All that magnificent estate frittered away on the beneficiaries."

Then, of course, both solicitors and barristers are often accused of negligence or carelessness. That they should be thought by their lay clients to have exercised a wrong judgment at a critical moment is inevitable: for critical moments will arise with surprising frequency, and lawyers can often see the dangers of a course that their lay clients with less experience think to be safe and helpful. But the accusation is often made that they have simply not taken the trouble to prepare the case properly. This accusation is, unfortunately, true in a large number of cases. Barristers can often see only too clearly that any amount of preparatory work, which would either have supplied a missing link of proof or avoided some fatal surprise from the opponent, has been neglected by the solicitors, from indifference, overwork, lack of imagination, or mere incompetence; and this happens, unfortunately, more frequently when the litigant has not much money

than it does in well-paid cases. Solicitors, in their turn, often observe that the barrister has either not fully mastered the facts of the case, or not looked up the law with sufficient thoroughness, or not seen the dangers of some course he is following, as a result of which a case is lost which might otherwise have been won. The position of a lay client who thinks that his solicitor or barrister has neglected his case is not too easy. So far as any attempt to obtain redress from the barrister is concerned the legal position is at any rate simple and clear; the barrister cannot be sued in any way whatever. The solicitor can at any rate be sued for negligence, and will be held liable if he can be proved to have fallen short of a proper standard of professional skill; nor can he shelter behind the barrister's advice except to the extent that he can show that he put all the facts accurately before the barrister, obtained his advice on them, and followed that advice faithfully. But the lay client's case is still a difficult one. He starts, generally, with his financial position impaired by having already lost an action which he expected to win; and he has to prove that if the solicitor had not been negligent the action would have been won—always a difficult thing to prove, so notoriously uncertain is all litigation. And, however hard the court may try to hold the balance, it will tend to sympathise with the lawyer in all but the most flagrant case, not so much out of a feeling of professional kinship as because it knows the many difficulties of professional work. It is clear that in many cases where there really has been a substantial degree of negligence causing or contributing to the loss of a

case the aggrieved lay client has been advised, or has concluded for himself, that the dangers attending an action for negligence are too great to be faced. And it is also clear that a great many litigants who have sought to obtain the necessary certificate from the Poor Persons Department[1] to enable them to bring as poor persons actions for negligence against solicitors have been refused such certificates where it has appeared to skilled observers acquainted with all the facts of their case that they had strong grounds for action. It is a great pity that the granting of such certificates should rest with committees of solicitors;[1] in some instances, no doubt, such committees will be particularly scrupulous in examining such cases, but in others, sitting privately and giving no reasons, they must be led to lean in favour of sparing their professional brethren the burden of such an action.

One particularly grave and prominent fault among barristers is that of "devilling", which consists in either not attending the hearing of a case at all, sending some other and generally less experienced barrister in one's place, or else in attending only to part of the case, leaving another barrister to do the rest of it. In the High Court and Court of Appeal, where very frequently two barristers are employed on each side, the habit of doing two cases at a time and running from one to the other is so well recognised and accepted that it is quite common to pay a higher fee on a definite stipulation for exclusive attention. This habit of incomplete attendance seems to the layman utterly

[1] See pp. 177 *et seq.*

inexcusable; the barrister's only excuse, and it is a perfectly genuine one as far as it goes, is that it is so utterly impossible to know when a case will actually come on, and so difficult to obtain an adjournment for lawyers' convenience, that no practicable method exists of avoiding two cases clashing.

It is worthy of mention, too, that it is commonly alleged against lawyers that they will not act with proper zeal on behalf of left-wing clients in cases that are more or less political. There is of course some truth in the accusation. Some lawyers would, rightly or wrongly, refuse to act altogether in such cases. A few would act half-heartedly, unable to put aside their own prejudices and present their client's case zealously. Many more, indeed the great majority, would fail through a complete inability to understand either the economic background of the matter or the outlook of the client. Nevertheless, more than most people imagine would put their whole powers into a sincere and vigorous presentation of their client's case.

Something should be written about one or two points of ethics. One of the most prominent points is that of professional secrecy, which is as important to the clients of lawyers as it is to the patients of doctors. Lawyers owe to their clients a complete duty of withholding from all the world the confidential information which they have received in their professional capacity; they are prohibited even from disclosing such information as witnesses in court, unless the client consents, and virtually the only limitation on their duty is that they are not so bound or protected if the information was communicated for the purpose of

contriving a fraud, or some other illegal purpose. The public has probably fewer grounds of complaint on this head of ethics than is commonly supposed; for although lawyers will talk freely among themselves of their cases they are extremely scrupulous about any further disclosure, and will as they should keep completely secret matters which might be of the utmost value, political or otherwise, if they chose to use them. They may indeed have a half-grievance in this respect, that many financial or industrial concerns will often withhold their cases from able lawyers who are known to be on the left, through an unjustified fear that they might make political use of the information they would inevitably gain of the organisation or operation of the concerns. (Some ingenious capitalists have at times "muzzled" lawyers who might have effectively attacked some scandal or another in Parliament by employing them to advise in connexion with some case arising out of the scandal in question, and thus rendering it virtually impossible for them to say anything publicly without appearing to disclose what they have learnt in professional confidence.)

A somewhat different point of ethics, one which looms very large in laymen's views of the profession, but in fact arises in practice so extremely seldom as to be of little practical importance, is that generally labelled as "defending a man whom you know to be guilty". This matter, which concerns barristers much more than solicitors, is not uninteresting, and is a little complicated, but it is worth explaining and the explanation is comparatively simple. In the first place, one must be clear as to what is meant by

"knowing". If any one is guilty of a crime, and wishes to be defended, he is very seldom foolish enough to tell his solicitor or barrister that he is guilty, and if he should tell the solicitor the latter would not tell the barrister. Accordingly, in most cases, the ethical problem for the barrister is not really, whether he should defend a man whom he *knows* to be guilty, but whether he should defend a man whom he suspects, with a greater or less measure of certainty, to be guilty. Now, very little thought shows that here there is really no problem at all. Every man who is accused is entitled to be defended (if in one way or another he can get counsel[1]) and to be acquitted unless the prosecution can get enough evidence to convince a jury of his guilt. If the case against him is one that gives strong ground for suspicion, the right to be properly defended is more important and valuable to him than ever, and his counsel's duty to defend him is if anything greater. It is no part of the latter's duty or rights to sit in judgment on him, or to act on the assumption that the suspicion is justified; he is there to present his client's case, not to decide it. The dilemma of popular imagination does not, therefore, often arise. There are, however, occasional instances where an accused person does tell his counsel, in terms and under circumstances admitting of no doubt, that he is guilty, and in those rare instances the problem of ethics really arises. The accused may give the embarrassing information at an early stage or at a late one. Whenever he gives it, his counsel is still perfectly justified in continuing to defend him, for the

[1] See pp. 191 *et seq.*

accused has, let it be repeated, the right to be acquitted unless the prosecution proves his guilt to the satisfaction of the jury. (The barrister of course has not the duty or even the right to assert his belief in his client's innocence; he has merely to put all the arguments tending to create belief in the jury's mind.) The real reason why it would generally be better for counsel who were informed by their own client of his guilt at any early stage to withdraw from the case is that it is naturally psychologically easier for someone not embarrassed by such information to fight the case with full vigour; but if the information is only given at a late stage, when withdrawal would excite comment and suspicion, and so injure the client's case, it is the duty of counsel to go on with the case, for once he has undertaken a case he owes a very high duty to protect the interests of the client. It is a pity thus to explode one of the most treasured of lay criticisms against barristers, but the explanation is not nearly so sophistical as it appears, and since it is the law that a man is entitled to be acquitted, however guilty he may be, if the prosecution cannot bring proof home, the profession is doing its duty to its clients as well as it can by following this course.

A somewhat similar problem, on a smaller scale but arising much more frequently, is that of apparent suppression of evidence. It often happens that a barrister will have, as part of the material obtained or prepared by the solicitor for the conduct of a case, say, three witnesses and half a dozen documents. He may form with his professional skill the view that the evidence of one of those witnesses will help his client's

case, and that either or both of the other two would contradict or nullify the first one and damage the case; and in the same way he may conclude that three of the documents will help and three will do damage. Here, whatever the lay critics may think ought to be the rule, his duty as laid down by his professional standards is clear. It is not for him to estimate how far this or that witness is really truthful or this or that document is really reliable; he has simply to conduct his client's case, putting before the court what he thinks in his skilled judgment will impress the court favourably, and not putting what he thinks will not have that effect.

Those who have already grasped both the formlessness of the law and the air of gifted amateurism that pervades so much of it will not be surprised to learn that neither the ethics nor the etiquette of the barrister's profession form any part of the matters on which examinations have to be passed to qualify for call to the Bar. These somewhat vital matters are left to be picked up as one goes along.

It is useful to consider how strong the legal profession is, how well-entrenched; for on this fact the fate of most questions of reform will depend. It is, on the whole, extremely powerful. The barristers' side of the profession is not merely wholly self-governing; it is recruited almost entirely from the upper-middle class; it is extremely well represented in Parliament and in society, in addition of course to providing the whole bench of judges, and its social prestige and actual wealth constitute it a very powerful obstacle to reform so long as it is opposed to it, and would make it a very

powerful support of reform if its small but rapidly-growing left-wing element once gained the ascendancy. The solicitors' side of the profession, much more numerous and somewhat more varied in composition, is still very powerful both in town and country, and makes at the very least a formidable reinforcement to the Bar, both in society, in Parliament, and elsewhere.

CHAPTER IV

A GLIMPSE OF THE LAW

IT WOULD NOT be possible or even useful in a book of this size to attempt to state the provisions of the law, but it will be helpful to give a general notion of the structure and development of the law, and in a later chapter[1] also to describe the procedure, i.e., to show shortly how the courts work.

The law of England is home-made. It owes very little indeed to Roman law, which has inspired so many modern systems, or to any other law. It has grown up in England, bit by bit, all by itself. It has, on the other hand, in the course of our Imperial development, imposed itself with all its faults and its virtues on a large part of the globe. Laws of English basis prevail not only in England and Wales and to some extent in Ireland but also in New Zealand, Australia, the Dominion of Canada and all its provinces except Quebec, Newfoundland, some parts of South Africa, all the States of the U.S.A. except Louisiana, and most of the Crown Colonies, besides covering a good deal of the field of law in British India and Burma.

One of the more curious features of this law is that it is really two systems of law half-fused into one. We started gradually with a number of unwritten rules or customs prevailing in different districts of England, and varying very much from district to district. As time went on, a fair body of these customs developed

[1] Chapter V, pp. 90 *et seq.*

into law common to the whole of England, and became known as "common law". It was still unwritten, and is still to-day in the main unwritten, having to be sought in text-books, which with some exceptions are not very well written and are not authoritative, and in judgments declaring this or that bit of the law, which are authoritative under the system of "case-law" which is explained below. After a time, many matters arose which the common law did not seem able to embrace. It made some praiseworthy and partially successful efforts to meet the new situations and circumstances, but it did not succeed in covering the whole field, and the practice grew up of appealing directly to the King for help when the law was incapable of dealing with a case that obviously required redress. The King referred these cases to the Chancellor, who was generally a person of some education, and slowly there grew out of this another system of law, equally unwritten, which was called Equity. At first of course it was more elastic than the common law, but it gradually hardened into an equally rigid system of law. And for some centuries we had two systems of law and two sets of law courts side by side, one dealing with some things and the other with others. They overlapped and collided, of course, but they managed to live together. There were some fields of law and litigation where the common law could do the whole work properly according to its lights, and there the Chancellor and his "Chancery Court" did not interfere; the criminal law is a good example. There were other fields where the common law could decide the rights of the parties, but could not give a satisfactory

remedy. There the Chancery Court would come in as "auxiliary" and help the common law courts by providing the remedy; a good example is that of a contract where damages, all that the common law could give, were not a satisfactory remedy, and Chancery could help by granting an injunction, i.e., saying to the defendant that, if he insisted on doing something which he had contracted not to do, he would be put in prison for contempt of court. Then there were other fields where the Chancery Courts alone provided the law, and the common law courts, as it were, did not even know what they were talking about. Trusts form a good illustration of this field. A trust was and is a form of property in land or goods, a true property; in the eye of Chancery, the property is in the beneficiary, who is really entitled to the whole advantage and use; but in the eye of the common law the property is in a "legal owner", whom Chancery called the trustee, and although everybody knew that the true beneficial owner was X, the common law courts could only recognise the legal owner Y and knew nothing of the trust. Any litigation about the trust would accordingly be dealt with by the Chancery Courts, and if Y attempted to take any real advantage of his bare legal property he would have an injunction from the Chancery Courts telling him not to attempt to use his legal rights either in a common law court or anywhere else, and threatening to imprison him for contempt of court if he did.

We have thus nothing in England remotely resembling the Code Napoléon, which forms the basis of the legal systems of France, Spain, Italy, the

Republics of South America, and many other countries—brief and logically arranged statements of the law of the country. We have, however, in addition to the great volume of the two unwritten systems of common law and equity, a great mass of Acts of Parliament. For many centuries Parliament has exercised the power of legislation, and has from time to time amended or repealed portions of common law and equity, introduced new branches of law (such as the Bankruptcy Laws), and even made piecemeal codifications of parts of the unwritten law (such as Partnership and Sale of Goods). Legislation has of course increased greatly in volume. The statutes from 1225 to 1340 occupy just under 500 pages in the ordinary edition of the "Statutes at Large"; those of 1936 alone cover 1,900 pages.

The two systems of common law and equity were united by statute in 1875; or, to be more accurate, the courts which administered them were fused into one, so that any man could get his rights in the one court, concurrently administering law and equity (i.e., common law and Chancery law), instead of as sometimes happened going to one set of courts only to find that he ought to have gone to the other.

With that history, one might expect the law of England to be complicated in any case; but it is still further complicated by what is called "case-law". This is a system by which, whenever a judge has to decide a point of law, the sources to which he must turn to find the law bearing on the point are the judgments of previous judges in other cases, recorded more or less accurately in printed reports; and when he in

turn has given his judgment, that may equally be recorded and serve as a precedent for other judges. These precedents are treated as binding; that is to say, any judge who finds a decision of a court superior to himself, and in most cases even a decision of a court equal to himself, bearing on the point he has to decide must treat that as good law and build on it, even if he himself thinks that it is not consistent with the true principles of the law. This system prevails not only in the interpretation of common law and of equity; it applies equally to the construction of Acts of Parliament. Whenever it is necessary to construe any part of an Act, to decide what it means, the judgments of judges who have already construed the Act or other similar Acts must be looked at to guide and indeed to compel the decision. Sometimes a judgment will stand for some years as the law, and then a higher court will "overrule" it as a precedent and lay down that the law is the opposite.

Judges and lawyers often defend this system. They say that it gives the law a certain flexibility, and enables it to modify itself in accordance with the thought of the time; and also that it enables the law to grow continuously like a tree. There is some truth in both these points, although it must be said that the law has not shown any great tendency to keep abreast of up-to-date thought, and that the tree is now very like a jungle. But the great defect lies in the expense and uncertainty involved, which weigh perhaps even more on the middle-class litigant than on the worker, but certainly do not allow the latter to escape.

To begin with, the system compels any lawyer who wants to do his work properly to equip himself with a library of between 1,000 and 2,000 books, and to add to it at the rate of at least a dozen volumes a year; he must in addition often resort to a law library that may have another 50,000 volumes. To find all the "authorities" on any point of law, even with the assistance of text-books, is a task that may occupy days of research, and no one can be sure that he has not missed one which his opponent may find and thereby win the case. The specialised skill and memory necessary for this long search for nuggets in the ore is part of the equipment of the lawyer; but it is part too of his scarcity value for which the public has to pay.

And, when the authorities have been collected, marshalled and examined, there still remains the curse of uncertainty. Will the judge say that the principles laid down in authority A, although binding upon him, do not govern the case before him? Or will he say that authorities A and B do apply to the case, but that they are really irreconcilable, and one of them must be wrong? And, if so, which? If the judge does decide in one's favour, will the other side carry the case to the Court of Appeal, which is not bound by authority C, but is bound by A, B, and D? And what will the Court of Appeal do? And will the case be treated as so important that one side or the other will seek to carry it to the House of Lords, so that the two litigants will be paying perhaps £1,000 each in order to clear up for the benefit of others what the law really is? Often a doubtful point of law will lie for many decades like a dangerous reef in a shipping route;

everyone will avoid it, settling or abandoning their cases, because to get it really cleared up will cost too much and no one can really tell which way it will go and who will have to pay the costs. An interesting example is the question whether a husband is entitled to insure his wife's life, whether as it is called he has an "insurable interest" in her life. The necessity for such an interest to exist for the validity of life insurance was laid down by statute in 1774, but the question whether generally, as a matter of law, a husband was to be regarded as having such an interest in his wife's life was not cleared up until 1909, for it did not happen until then that anyone interested in the point was able and willing to face the expense of getting it decided.

And when a point, however frequently it may arise, is unlikely in any particular case to involve a substantial sum of money, it will probably never be cleared up at all. The ordinary terms of employment of a domestic servant must concern many hundreds of thousands of people, and probably many people think they know what the terms are. But there are some points of doubt about these terms, and on some points the text-books disagree with one another. What exactly the law is, depends of course on the decided cases; and, as the cost of getting such a point decided grew a long time since to be wholly disproportionate to the amount of money likely to be involved, it is improbable that there will be any new decisions except in County Courts, whose judgments do not bind other courts. The result is that on small points of every-day importance the law has to be sought in judgments a

hundred years old or more, not very fully, clearly or reliably reported.

Nor are these extreme cases. Doubts may and do persist in many fields of law for many years. Sometimes the whole legal profession will feel pretty sure that a decision is wrong, but it may stand as authoritative for decades before the parties concerned in a case which raises the point are litigious enough, or public-spirited enough, to meet the expense of going to a higher court to clear it up.

The ever-increasing stream of Acts of Parliament makes things worse. It might be used to make things better, if Parliament had time, inclination and understanding enough to pass regularly Acts to clear up and explain doubtful matters of law; but this is rarely done. English legislation is often well-drafted at the outset, but it is altered and "tinkered with" as it goes through Parliament and the English language for all its merits is not a really good one in which to express precise legal conceptions. When a point of law arising on an Act has to be decided, the Act itself has to be considered, with any Acts amending it or amended by it, and the "authorities" must be looked at in the same way to see what light or darkness they throw on its meaning. If it is a relatively recent Act, there will not be much case-law affecting it, unless words similar to it have been used in earlier statutes and made the subject of decisions; but if it is an old statute it may have a vast mountain of authority. One short statute passed in the reign of Charles II has had a text-book written about it which itself (apart from the authorities it cites) is longer than the

whole Codes of some Continental countries; ten words in the Workmen's Compensation Act have been the subject of many hundreds of reported cases in about one-third of a century; and the Rent Restriction Acts have built up a vast fungus of case-law in an even shorter time.

The simplest case, if any question of law arises—and one can never be sure that no point of law will arise—may involve the citation of 30 or 40 authorities, scattered about 30 or 40 different volumes of reports; copies of the volumes must be fetched for the judge, and all the facts and arguments and judgments studied, with all the while the dread thought that when the judge gives his judgment there will be one more long "authority" for the next generation of lawyers to read.

An amusing illustration of the uncertain operation of the system of case-law was seen a few years ago. In an important arbitration, the arbitrator, as he was entitled to do, sought the guidance of the High Court on the question of law arising in the case by submitting a "stated case" setting out the facts which raised the question. This was argued before the High Court by the counsel for the parties to the arbitration, and the court gave its view, from which under that particular procedure no appeal lay. The case then went back to the arbitrator, who concluded the hearing and made an award in favour of the side that had won the argument before the High Court, on the basis of the view of the law given by the court. Now, among the rules by which the courts control arbitrators, there is one to the effect that if the arbitrator makes an error of law which can be seen upon

the face of the award the High Court can set aside the award. The losing side accordingly applied to the court to do this. It of course replied: "Error of law, indeed! He has set out what we told him was the law. What better law could he find?" But this procedure, unlike the other, permitted of appeal, and the losing side went to the Court of Appeal. That court said: "Error of law? We agree with you. His law is bad. He got it from the High Court, no doubt; but it is bad!" They accordingly ordered the award to be set aside; and the House of Lords affirmed their decision.

It is quite common for a decision of the High Court to be reversed by the Court of Appeal, and for that court to be reversed in its turn by the House of Lords. Many important cases, not merely governing the rights of the parties but also having a great weight in settling the case-law, have been decided one way by a majority in the House of Lords whilst of all the judges who have actually given judgment in the case a substantial majority have been of the contrary opinion.

So much for the general structure and nature of our law, which in spite of certain merits are largely responsible for the complexity and expense of litigation and the consequent reluctance of many persons to litigate. It has, indeed, been said that only the very rich and the very poor can afford to litigate in England; the very rich because they can meet the expense, and the very poor because they cannot become any poorer and, if they can only get a solicitor to act for them, can force the rich opponent to settle with them. The rich know that to fight and defeat an unfounded claim

by an unscrupulous poor man will cost them, say, £500; the poor man says; "Pay me £450; if you don't I'll carry on somehow and it will cost you more than £450." (This is called "nuisance value" and is almost the only weapon available against the unscrupulous insurance companies mentioned on page 136.)

There are, apart from this general description of the law, one or two particular sections of the law which are worth studying owing to the importance of their social effects. The first of these is the law of libel; it is a law designed to give people damages if they are brought into "hatred contempt or ridicule" *by written or printed matter published about them.* It sounds harmless enough, even when one is warned that it is a particularly fruitful field for "case-law"; but in truth it has grown into such a mass of uncertain complicated and technical law that no man knows when he is safe from it. The man who writes any serious comment, political or otherwise, on the activities of another—be he politician, banker, industrialist, financier, or company promoter—takes his life, in a sense, in his hands. He has to remember that the party he is criticising may issue or threaten to issue a writ for libel. He knows that to fight a libel action, even with complete success, is so burdensome both in time and money that it is to be avoided at almost all costs. He knows that, if he does have to fight such an action, and sets up the defence of "fair comment on a matter of public importance", the normal and proper defence of any serious critical writing, he must in addition to persuading the jury that the comments contained in the writing are fair,

prove strictly every statement of fact made or implied in the writing. It is of no avail to prove that he believed after full inquiry that the statements were true; he must prove that in fact they were true. He knows that, if he is a left-wing writer, the jury will be prejudiced against him. And finally he knows that the jury will have a free hand in assessing the damages, and may give a very large sum which will not be disturbed by the Court of Appeal. The results of this are disastrous. It is not only that every serious left-wing book or pamphlet has to be written page by page with an eye on the difficulties and dangers of a libel action, and often enough sifted afterwards by lawyers who cut out important passages as a precaution, so that in the result half of what should really in fairness be allowed to reach the public eye as a contribution to the discussion of some matter of public importance or the removal of some abuse is cut out. It is worse, in that much of what is thus sacrificed is sacrificed in vain, not so much because (as does happen) the book meets with a libel action after all through some trivial phrase that has escaped notice, but because if the book had been published in full as the writer really and honestly believed it should be written and wanted to write it the party criticised would not in fact have ventured to sue. The net result of all this as an invisible and capricious censorship of political writing is probably more damaging than would be the operations of a moderately intelligent express official censorship.

One or two other sections of the civil law are explained in Chapter VII, in connexion with the

provision of legal aid for the poor, and may be referred to as illustrations of the complexity of the law.[1]

One may usefully take now one or two examples from the criminal law, the whole of which is of course instinct with reactionary orthodoxy, forbidding most of the things which some of the poor would naturally tend to do to the annoyance of the rich, and not doing much about the anti-social things which the rich are prone to do. As Lenin said: "Steal a loaf and go to prison; steal a railway and go to the House of Lords." A very curious instance both of the tenacity of law and of the blind way in which Governments will legislate against economic effects instead of causes is to be found in the Vagrancy Laws. They have a long and tangled history, and have gradually gathered to themselves a miscellaneous collection of odd offences; but in essence they consist in blind, ill-tempered and vindictive hitting-out at people who are guilty of the unpardonable offence of being poor. One of their tragedies is that they have, as it were, travelled to the U.S.A. with the rest of our law, and indeed in one State have developed to such a point that wandering about without visible means of subsistence is punished with a minimum sentence of three years in a chain gang.

Their history begins in 1388, when the ruling class was very indignant with labourers who were base enough to try to take advantage of the scarcity of labour caused by the Black Death, by moving about from place to place in search of higher wages. Later, the arrival of the first gipsies in the reign of Henry

[1] See pp. 156–8, 170–2, 185–8.

VIII provided a further class of people who wandered about instead of stopping in one place and working for their betters, and later still the establishment in the reign of Elizabeth of the system of parish assessment for the relief of the poor provided every parish with a very strong reason for demanding that no one of slender means should be allowed to wander into the parish. In course of time, naturally, the development of the industrial system produced a much greater assortment of tramps and other wanderers, and Vagrancy Acts continued to be passed and amended to deal with them. In their present form, or formlessness, the Acts deal with a variety of matters, some directly traceable to their history, and some having but a small connexion with it. They are still active, having indeed been amended as recently as 1935, and are to be found in the text-books in their proper alphabetical place, between Vaccination and Vermin. They are well worth studying from several points of view. They divide their victims into a sort of inverted peerage of three grades. The first or lowest is that of "idle and disorderly persons"; the next step makes one a "rogue and vagabond"; and the last carries the description of "incorrigible rogue". Like the titles in the peerage, these descriptions do not really mean anything; a man qualifies to be called "idle and disorderly" not necessarily by being idle or disorderly in any general sense, but by committing one of the specific offences set out in the various Acts. Similarly he becomes a rogue and vagabond without necessarily doing anything roguish, or wandering about; and he becomes an "incorrigible rogue"

without any proof that either he or the social system which has got him down is incorrigible.

To qualify for the first class, you must take one of various steps of which the following are the most important:—

(1) being wholly or in part able to maintain yourself or your family by work or other means, you must wilfully refuse or neglect to do so, so as to make yourself or your family chargeable to the Poor Law; or

(2) you must be a woman who, able wholly or in part to maintain her bastard child, neglects to do so, so that the child becomes chargeable to the Poor Law; or

(3) you must return and become chargeable to any parish or other place from which you have been removed by the justices; or

(4) you must be a pedlar without a licence; or

(5) you must beg in public; or

(6) you must be an insubordinate or disobedient pauper.

On proof of any of these qualifications, you may be fined £5 or imprisoned for one month.

To become a rogue and vagabond, you must either commit any of the offences which constitute you an idle and disorderly person, having been previously convicted of any of those offences, or you must commit one of the following offences:—

(1) you must tell fortunes, to deceive and impose on any of His Majesty's subjects (this, no doubt, originally, to deal with gipsies); or

(2) you must wander abroad, and lodge in a barn or outhouse, or in any deserted or unoccupied building, or in the open air or under a tent, or in any cart or waggon, and not give a good account of yourself; (this is the well-known offence of "sleeping-out", one result of whose existence is that if a homeless man sits in a seat on the Victoria Embankment and goes to sleep during the day he is a law-abiding citizen, but if he sits there and goes to sleep at night he is a rogue and vagabond the first time and an incorrigible rogue the second time. It is the duty of the police on the Embankment at night to prod him into wakefulness to save him from this fate. But progress has been made, for in 1935 various elaborate qualifications were applied to the ingredients of this offence); or

(3) you must expose obscene prints or pictures; or

(4) you must expose your person; or

(5) you must expose your wounds or deformities to gather alms; or

(6) you must fraudulently collect alms; or

(7) you must run away and leave your family chargeable to the Poor Law; or

(8) you must play pitch and toss or other such games in a place to which the public have access; (some American soldiers playing pitch and toss on the vacant land in Aldwych one quiet summer afternoon in 1918 were solemnly taken into custody with a view to being charged as rogues and vagabonds; but so many of their colleagues gathered round Bow Street police station to enquire by physical violence into this curious state of the law that they were at once released without a stain on their character); or

(9) you must have a picklock key or other implement with intent to break into a building; or

(10) you must be armed with an offensive weapon, with intent to commit a felony; or

(11) you must be found on premises for an unlawful purpose; (it always seems hard to make it an offence to be "found"; after all, the police find you, you have no intention or desire to be found); or

(12) you must be a suspected person or a reputed thief frequenting a river, canal, dock, basin, quay, wharf or warehouse, or any street or place of public resort, with intent to commit a felony; or

(13) you must violently resist apprehension as an idle or disorderly person; or

(14) you must be a male person living on the earnings of prostitution.

Rogues and vagabonds may be fined £25 or sent to prison for three months.

Now for the incorrigible rogues. To be one of these, you must commit an offence which qualifies you to be a rogue and vagabond, having previously been convicted as a rogue and vagabond, or you must commit one of the following offences:--

(1) you must break out of any place of legal confinement before the expiry of the term for which you have been sent there under the Vagrancy Acts; or

(2) you must violently resist apprehension as a rogue and vagabond.

When you are convicted as an incorrigible rogue by the justices in Petty Sessions, they cannot sentence

you; they may commit you to prison until the next Quarter Sessions, and then that court can award you imprisonment up to a year more, with a whipping.

This is the law of a civilised country, in 1937; it is kept up to date and is frequently used. As a piece of jumbled legislation, it is not much worse than a good many other Acts of Parliament; as an intelligent contribution to the maintenance of order and the improvement of the condition of the people it is really the political economy and sociology of a madhouse. It will be observed, for example, that two convictions for playing pitch and toss, or for fortune-telling, or three for peddling without a licence or begging, might lead to you being kept in prison for 14 months, and whipped.

Another branch of the criminal law that may be shortly mentioned is that relating to any sexual abnormality. This reproduces the most primitive and unthinking reactions of old-fashioned prudery, and sends to prison often for very long terms persons who ought either to be completely at liberty or under the treatment of doctors or psychologists. A typically tragic case of this kind occurred a few years ago. A young man, mentally slightly unstable, was found committing an act of indecency; he was wearing women's clothing at the time, his abnormality making him very prone to do this. He was duly charged at the Assizes, before a judge who was one of the most upright and honourable of judges, but was very shocked by sexual abnormality. The judge, on hearing the details of the charge, insisted on the lad leaving the dock to put on the women's clothing which he had been wearing at the

time of the offence. He was convicted. His only previous offence was that of obtaining money by false pretences, consisting in hanging about the streets in women's clothing, getting money from men, and forthwith running away. The sentence was 18 months' imprisonment. Persons who had by then become interested in the case enabled him to appeal to the Court of Criminal Appeal, who dismissed the case with the observation that the sentence was "not a day too long". It is only fair to add that the then Home Secretary allowed the lad to serve his term in a prison in London and to be taken twice a week to Harley Street to receive psychological treatment. But one is forced to wonder how long this civilised country must wait before horrors of that kind are even recognised to be horrors.

CHAPTER V

THE PROCEDURE OF THE COURTS

IT IS OF the greatest importance to any proper grasp of our legal system to understand how the Courts work in the actual treatment of cases. The manner in which a case is tried is often far more important as an element in the attempt to achieve justice than the actual law that governs it.

It is proposed in this chapter to explain as far as possible the manner of trial, which is called procedure. The questions how far men are equal before the law, what provision is made for the conduct of poor men's cases, and how the law in general and the courts in particular operate when they come into contact with political and industrial matters, will all be treated in later chapters; but even omitting any consideration of those matters it is important to understand the court procedure itself.

To begin with, it is probably necessary to justify, and it is certainly necessary to explain, the existence of elaborate rules as to procedure. The layman is apt to think that two persons having a dispute can go into court and have it decided out of hand, without much or any preparation. But life is complex, and very few cases are as simple as that. To begin with, as recollections vary and people are moreover not always truthful, neither side knows exactly what the other will say. They want not merely to prepare themselves with their witnesses and documents to put their own

story to the court, but also to meet the case of the other side, if necessary with more witnesses and documents; and they may well have a quite erroneous impression as to what the other side will say when the time comes. So one of the principal objects of the procedure is to provide as far as possible firstly that the dispute (what lawyers call the "issues") should be clearly defined, and secondly that each party should have at any rate some knowledge of what the other side is going to say,—often indeed some access to their documents. When the procedure works properly, as in many respects it often does, the parties when they finally come into court, have had every opportunity to prepare their case properly, if they can afford to do so; and, although cases will often after all take an entirely unexpected turn at the hearing, that is the fault not of the procedure but of the "inherent cussedness" of facts.

The procedure varies considerably both as between civil and criminal cases and as between the less important and the more important cases. Procedure in criminal cases remains very much as it was centuries ago, having been saved from complexity partly by the necessity of keeping it simple for the benefit of prisoners who have no counsel, and partly because there is little opportunity for earning or spending large sums of money in criminal cases, and so there has been no motive for developing more elaborate and expensive machinery. It is in the civil litigation in the High Court that the real elaboration is to be found.

Although the High Court is mainly the resort of the upper and middle-class litigant (it is indeed

largely occupied with disputes between banks, large industrial undertakings, merchants, shippers, and the like, although it has as well a fair volume of accident cases in which workmen are involved) it will probably be best to describe the procedure in that court first, since it will be easier to describe the other and simpler procedures by reference to what is omitted from this most elaborate of all the courts.

A case in the High Court, when it has once been brought into existence by a writ, generally begins with what are called "pleadings". Laymen think of the word as meaning an argument in court, but in this instance it is used to describe formal documents of some technicality and strictness, not necessarily very long, in which the parties set out their claims or demands, or their answers to the claims or demands of the other side. These documents may take a few weeks to prepare and cost a good many pounds; for the solicitor almost invariably employs the junior barrister who is engaged for the case to prepare them, and this is skilled and difficult work. Moreover, each side generally demands further details ("particulars") of the allegations in the other side's pleadings, and this involves more delay and more expense. When the pleadings have all been finished ("closed" is the technical word) it is supposed to be and generally is possible to ascertain from them what the real dispute (the "issues") between the parties really is, and it should not thereafter be possible for either side to spring a major surprise on the other. If this should be attempted, it will generally be found that it is outside the scope of the pleadings, and so is not

allowed to be raised unless permission is obtained to alter or "amend" them.

Now that the parties know what the real dispute is, they can proceed with the preparation of their evidence. They will already, of course, have gone some way with this, for they will not have incurred the expense of starting or resisting an action without some knowledge as to whether they have evidence to support or resist it, as the case may be; but it is only now that the solicitor, with some advice from the barrister, can go definitely forward on firm ground to prepare the exact evidence he needs to fight the case. According to the nature of the case, the evidence may be very voluminous, or quite modest, and it may consist mostly of witnesses giving their evidence orally, or mostly of documents. One of the features of modern expensive trials is the great volume of correspondence. It is quite common to have 500 or 1,000 pages of letters to deal with. In the old days, when letters were written by hand, people wrote carefully and not so frequently; in modern times, when letters can be dictated, businessmen rattle off dozens and even scores of letters every day, and if they do find themselves in court all these letters are hunted out, copied, scrutinised, and made the subject of close argument and discussion which the man who dictated them rapidly in bad English, and the typist who improved them a little into rather bad English, never dreamt would befall them. And the frequent and praiseworthy attempts by solicitors to save expense by eliminating obviously unimportant letters from the material put before the court always seem to end, by some perversity, in it being found

unexpectedly that some apparently trivial letter which has been omitted is really of great importance in helping to determine some fact or another.

Each side has ample opportunity to see the other side's documents, for there is a system (inherited from the Chancery Courts) which is called "discovery" but would be better called disclosure, whereby each side must show to the other before the trial, and allow to be copied if necessary, every document in their possession, with certain exceptions, which is "relevant", i.e., material, to the matters in dispute. This is a costly but extremely valuable right; like much of the system, it is designed to work well regardless of expense, like a high-quality automobile, and there is no real parallel to it in any legal system not historically associated with our own. What is "relevant" is decided by reference to the pleadings; one ascertains from them what the issues are, and then applies the test, whether the particular document does or does not help to determine any of the issues one way or the other. Much time and much money is often expended, sometimes to great advantage, in disputes as to what documents are relevant, and as to what are "privileged" to be withheld from production on one or other of various technical grounds.

It is somewhat remarkable that what lawyers call "the Crown", i.e., the Government in any of its many manifestations, is wholly privileged from disclosing its documents. It is neither bound to show them, nor to state what relevant documents it has, nor even whether it has any. This tremendous and utterly unfair advantage is occasionally waived in practice, but it is normally used to the full, and is maintained with great

tenacity, attempts to alter it by legislation having been uniformly resisted. The hostile critic will say that it shows that Government departments share his view that little of their activities could survive investigation; the more serious student will be shocked by the way in which those litigating against the Government, which starts with the advantage of the long purse and a certain prestige in the courts, are thus further gravely handicapped. It is odd that so many people still believe that the British Government is at an actual disadvantage over against the ordinary citizen in comparison to other Governments.

Technically a part of discovery, and of the same historical origin, is the system of administering "interrogatories". These are carefully drawn questions, prepared in writing and put by one side to the other, to be answered by affidavit (i.e., in writing, on oath). Again, they take time and money; again, they are sometimes extremely valuable. And again, there is a whole series of rules as to what may or may not be asked, and what grounds of "privilege" enable the interrogated person to refuse to answer. The real merit of this system is that it sometimes enables one party to prove out of the mouth or rather pen of his opponent some fact, vital to his case, which he could not otherwise prove; but it is often used quite unnecessarily to ask a series of questions which are pretty certain to be answered the wrong way, or to vex an opponent by putting awkward posers to him which do not necessarily assist the case.

Thus, in general, the solicitor preparing the case for trial within the framework of the pleadings has

four main sources of raw material for his work—the evidence of his own witnesses, his client's own documents, the other side's documents seen on discovery, and if necessary answers to interrogatories. He has to have the advice of the barrister to some extent as to how to go about this work, because although he may be very skilful and experienced at getting lay clients and witnesses to tell him their stories in their own way and then sifting them all down to something solid that will survive the intellectual buffetings of the trial, he has not generally the same skill or experience as the barrister has in the laws of evidence, which will apply at the hearing to admit or exclude the evidence he is preparing. On these, a few words must now be written, by way of digression.

These laws, which apply equally to civil and criminal law, and are largely "judge-made law", are in essence a set of rules determining what facts are to be regarded as relevant to any issue, and what evidence may be admitted to prove those facts. They constitute perhaps one of the major peculiarities of English law, and few other systems have anything really equivalent to them. They have grown up gradually out of two anxieties rightly displayed by the courts through the earlier stages of our history. The first anxiety was to ensure that nothing should be given in evidence that would unduly prejudice a jury against a prisoner, for in the old days when most crimes were punished quite simply with death by hanging, it often happened that judges and juries were quite willing to help even a guilty prisoner to escape the penalty. For example, if a man is charged

with stealing lead, it would seem to the superficial observer that the fact that he had stolen lead regularly for years, whilst not enough of itself to call for a conviction, would certainly make it decidedly more probable that he had stolen lead on this occasion also, and would accordingly fall within the definition of relevance. But it was found in practice that, if evidence of previous convictions were permitted, juries invariably found prisoners guilty, and so the rule was laid down that, in general and subject to certain exceptions, evidence of previous convictions or bad character could not be given. The second anxiety was to ensure that only the most reliable evidence of any particular fact should be given; e.g., if a document were in question, the original should be produced rather than a copy or a mere recollection of someone as to what it contained; if any occurrence was to be described it should be described by an actual eye-witness, and, if something that the prisoner said was to be proved, it should be proved by someone who heard it said, not by someone who afterwards had it repeated to him. Many of these rules are very good in themselves, but when compulsorily applied, as they have to be in the absence of consent to their relaxation, they often lead to great complication, difficulty, and expense, and at times make it quite impossible to prove a genuine case. They are of course useful to litigants who want to be vexatious here in England, but to see them at their most mischievous one should watch them in operation in some part of the Empire where the inhabitants are naturally litigious, intelligent, and ready to use every weapon available. They

think that this marvellous system of objecting, often successfully, to every document produced and every question put by their opponent is the most beneficent of all the Imperialist blessings showered upon them. Probably the true remedy for the defects of the system is to regard the rules of evidence no longer as binding rules but merely as useful guides, more attention being paid to evidence admissible under the old law, and what was previously inadmissible being admitted but more cautiously weighed; this reform could only be achieved by legislation. Our courts would then be in much the same position as the courts of most Continental countries, which have few restrictive rules as to evidence, and do not seem to feel the want of them. If this should be done, it would form an interesting parallel to what was done under the inspiration of Jeremy Bentham in connexion with the old rules as to "competency" of witnesses. Up to his time, lawyers and their clients were vexed not only with problems as to whether documents could be used or questions asked, but also as to whether certain persons could even be allowed to give evidence at all. The actual parties to the action, who of course knew more about the facts of the case than anyone else, were in general not allowed to give evidence. It was held that, as they would naturally be prejudiced in their own favour, and would be tempted to commit perjury, they ought not to be allowed to give evidence, and many cases were lost because some essential link in the proof could only be given by a man who was not allowed to go into the witness-box. Nowadays, they are allowed to give evidence, their evidence is

weighed and estimated having regard to their demeanour and in the light of the fact that they are interested parties, and they can be prosecuted for perjury if (as seldom happens) the necessary evidence is available. But it was only in 1898 that persons charged with crime were allowed to give evidence, and many practitioners think that prisoners often thereby get convicted when in the old days they would not have been. (Similar difficulties arose in connexion with people who could not take the oath, such as Quakers or Moravians; their evidence was simply not admitted, until the matter was remedied by statute.)

To return from this necessary digression to the procedure in a High Court action, we can pass from the stage of preparation to the actual hearing with a mention of the fact that the procedure is now so elaborate that editions of two separate text-books on the subject, containing the "Rules of the Supreme Court" with the necessary comments and references to cases, are published every year; they are both printed in quite small type, but nevertheless each contains nearly 4,000 pages of printed matter.

The case now comes into court, and will by this time probably have acquired a senior barrister, or K.C., on each side, in addition to the solicitor and his staff and the junior barrister. Under the strict rules of our procedure, cases are genuinely so difficult to conduct that the K.C., who devotes nearly the whole of his time to work in court and should consequently be more skilled at it, does really serve a useful purpose. The case is first "opened", that is, fully explained in narrative form to the judge (or to the judge and jury

if there is a jury; juries are still employed in a fair number of civil cases). A skilful "opening", especially if it frankly exposes the weaknesses of the case and anticipates what the other side will say, often makes all the difference between success and failure, and the opening is consequently one of the most important parts of the work of leading counsel. When the opening is over, the witnesses for the plaintiff are called and examined in chief by the plaintiff's counsel, and cross-examined by the defendant's counsel. In this examination, the rules of evidence keep coming to the front, and many objections may be taken, either that something the witness is intended to prove is not relevant to the action, or that he is not qualified to prove it, because his is not the "best evidence", (it may, for example, be only hearsay), or again that the question put to him is a "leading" question. Laymen often misunderstand this term; its true meaning is that the question suggests its own answer, and it is objectionable merely because the witness should give the story from his own recollection, and not have it put into his mouth. Many stories are told of ingenious efforts by the more resourceful of barristers to overcome the difficulties of getting from a witness a story which the witness may not know very well, because it has been largely embroidered if not actually constructed for him by the less scrupulous of the craft. One is perhaps worth repeating here. It is told of a barrister, now dead, who was always willing to stretch a point to help a client, but was none the less loved by his fellows not only for his humour but for his complete absence of any hypocritical pretence of strictness. He was

examining his client, the plaintiff, in an action for an alleged assault, and in a previous case he had been repeatedly checked by the judge for "leading" his witnesses. In the assault case, the judge was watching him like a cat watches a mouse, and he accordingly began very carefully thus: "Do you remember anything?" The plaintiff, not skilled in the law of evidence, was a little puzzled, and replied that of course he remembered many things. The penitent counsel advanced a step or two in the chain of the story: "Anything about this case?" "Yes," said the plaintiff, still a little puzzled. "Anything about anybody in connexion with the case?" ventured counsel. "Yes," again. "Who was it?" "The defendant, of course," said the plaintiff. Definite progress was thus made, and counsel asked cautiously, and step by step. "When?", "Where?," "At what time of the day?", and even "Was anyone else there?". He had thus got to the threshold of the vital part of the case without being pulled up, and he now faced his greatest danger boldly. Drawing breath, and speaking very rapidly, he said: "And-did-he-suddenly-turn-without-warning-and-deal-you-a-violent-blow-in-the-face?"

In cross-examination, where the witness is not likely to be "led", the rule against leading questions does not apply. With certain modest exceptions, any question may be asked in cross-examination. There are normally three things that counsel for the defendant, cross-examining the plaintiff or his witnesses, should or may do. He must put to the witness the version which his witnesses are going to give of any incident to which the witness has testified, so that the witness

may have an opportunity to reply to it or explain it. He may extract from the witness any evidence which he hopes will assist him in establishing his case; and he may put questions "to credit", designed to show that the witness is a person who ought not to be believed; (but when he asks questions merely to credit, that is, questions not relevant to any issue in the action but only to the trustworthiness or credibility of the witness, he must accept the witness's answer for better or worse, and cannot call evidence to contradict it, save in the one case where the witness denies that he has been convicted of some criminal offence). Skilful cross-examination may often make the difference between winning and losing a case, and the plaintiff and the more important of his witnesses will probably be cross-examined by the defendant's leading counsel rather than by the junior counsel, although this is a matter of arrangement, depending partly on their relative skill and partly on the possible desire of one or other of them to go for a time to another case in which he may be engaged. Cross-examination is one of the more spectacular parts of work in court, and of more interest to laymen. It is a just and useful weapon in some cases, and in others it is extremely dangerous. When a witness is honest and not frightened by his unaccustomed surroundings, cross-examination will merely bring out the fact that he is honest. But it is very common for an honest witness to feel so strange in his new surroundings, and to be so little accustomed to thinking quickly while standing up, that he begins to hesitate and doubt under the mildest cross-examination, and all but the most experienced

will get the totally erroneous impression that he is not telling the truth. Cross-examination can of course be made a weapon of abuse. There was once an excitable theatrical producer who was very anxious to litigate against another one with whom he had a feud. His solicitor, advising him not to sue, told him that in his opinion he would probably lose. "Oh!" said the angry man, "I don't mind losing! All I want to do is to get that fellow in the box-office and have him asked questions."

When the witnesses for the plaintiff have all been examined, the defendant's counsel opens his case in the same way, and his witnesses are examined and cross-examined. He then has a final speech, followed by a final speech from the plaintiff's counsel. Then, if there is a jury, the judge sums up, that is, he tells them the law, and reminds them of the facts, and leaves them either to find a general verdict for one side or the other or to answer specific questions put to them. Their answer, whatever form it takes, is called a verdict. Any arguments of law are put to the judge either in the course of counsel's speeches or at any other moment that is convenient. The judge, if there is no jury, gives judgment, generally a full narrative with reasons for his decision, either at the close of the case or after he has taken time to consider it. If there is a jury, he gives judgment on their verdict, and does not deliver a reasoned judgment unless questions of law are raised as to which party is entitled to succeed on the verdict.

That is the end of the High Court trial, with its elaborate procedure and its considerable expense.

But the law is notoriously uncertain, and the more thoroughly lawyers work on a case the more uncertain it seems capable of becoming. So the losing party may appeal to the Court of Appeal, if he can afford to do so. In that court there is very rarely any question of witnesses or any further evidence at all; the argument is conducted simply on the documents and notes of the evidence, and the judgment may be upset either on a different view of the facts or on a different view of the law. Whoever loses in the Court of Appeal used to have an absolute right to take a further appeal to the House of Lords, sitting in its judicial capacity; but now he can only go by leave, which is given whenever the complexity of the case, the division of opinion among the judges, or the principles or amount of money at stake make it reasonable.

There is no doubt of course that this elaborate and efficient, if slow and costly, procedure has developed gradually in response to the conscious or unconscious demand of rich litigants for a good and costly machine, in exactly the same way as rich golfers produce extremely elaborate golf courses and rich holiday-makers produce luxury hotels. Discussion of the social evil of such a development must be reserved for the next chapter.[1]

We can now turn to the procedure in the County Court, and describe it shortly in terms of its comparison with the High Court procedure. The County Court is peculiar in that it really tries to do three different things. In the first place, it is a debt-collecting court; that is to say, a court in which people who owe money

[1] See pp. 134 6.

and know that they owe it, but do not pay because they cannot or will not, have to be sued. (The High Court is also a debt-collecting court, but not nearly as much so in proportion to the volume of its other work.) The proper function of a debt-collecting court is to enable judgments to be obtained quickly and cheaply, without shutting out from their defence people who really have some sort of a defence and want to fight it, and as far as possible also without letting people who have no defence gain time by bogus pleas. Such courts should also attend to the actual recovery of the moneys owing, and this is particularly important in the County Courts, where the debtors are people of small means owing small sums. The second part of the County Court's work is to act as the Court where poor and rather poor men can get their disputes settled fairly simply and fairly cheaply. The third part is to deal with more substantial litigation falling within its jurisdiction by people who are not necessarily poor. The limit of its usual jurisdiction is £100, but actions involving unlimited sums may be remitted by the High Court to the County Court, either by consent or on the application of the defendant in certain cases where the plaintiff has not the means to pay the heavier High-Court costs if he loses.

The County Court procedure shows traces of this threefold purpose. It is not necessary, probably, to explain the debt-collecting procedure; but the other two are dealt with by having a fairly simple procedure as the normal course, with the possibility of grafting the elaborations more usual in the High Court on to the heavier cases to which they are more appropriate.

The essence of the procedure is that the plaintiff starts the action by a "plaint", giving short particulars of his claim, and that the court then allots a day for hearing, at which the defendant should appear. If neither party wants anything more in the way of preliminary procedure, the case will be fought out on that day, with all the risks of surprise and imperfect preparation mentioned above. If solicitor or counsel appear, the speeches, evidence, and judgment will run in much the same way as in the High Court, except that in simple cases the opening will be omitted and that in any case the defendant is only allowed, in strictness, one speech. If no lawyers are employed, the parties make their own speeches as best they can. A jury can be summoned in certain cases, but very rarely is.

Now, to see how the procedure can be gradually built up on that very simple nucleus. In the first place, the plaintiff may give notice that he wants the defendant to deliver a "notice of defence" (and in any case the defendant has to give notice of certain special defences, like infancy). One thus gets substantially to the equivalent of pleadings. Then, either side may apply for an order for discovery, and in a suitable case will get it; and the same thing applies to interrogatories. One way and another, the action may be quite elaborate; the Rules applying in the High Court may be applied when the County Court Rules do not cover any particular point, but those Rules are themselves pretty full, and the County Court, like the High Court, has two text-books of its procedure, each having a new edition yearly, and not being very much

smaller than their High Court equivalents. County Courts sit in all the large towns, and a great many small ones, on definitely fixed days. Litigants never have to travel very far to a court, (whereas in High Court cases they will have to travel to the nearest Assize town, which may be some distance off, and only too often to London). The costs of a County Court case will be about half the costs of a similar case in the High Court. The costs payable by the losing side to the other are very strictly controlled by scales, so that they cannot run into very high figures, whereas in the High Court, although they are "taxed", i.e., assessed, by a Taxing Master who does not allow more than an uncertain portion of the amounts actually expended, they may well run into very large figures indeed.

Appeals from the County Court go nowadays to the Court of Appeal. When over £20 is involved, there is an appeal as of right, on questions of law only, the judge's finding on the facts being conclusive. (It is perhaps typical of the unconscious and almost automatic fashion in which the poor are fobbed off with second-quality goods that the finding of fact in courts where most of their litigation takes place should be conclusive, whilst the rich man can question a finding of fact in the Appeal Court. It is not that County Court judges are better than High Court judges, so that there is no need to question their findings; it is that there is a large volume of small cases in the County Court, and the ruling-class mind instinctively revolts against the expense necessary to provide sufficient appellate courts to deal with the large mass of appeals that might result. It is better that the poor should put up

with what may be perverse decisions than that money should be spent on providing them with adequate redress.)[1] Under £20 there must be leave from the County Court judge, and the Court of Appeal cannot grant leave. There is a story of one judge who did not like appeals, and refused an application with the remark: "I never give leave to appeal unless I am sure I am right."

It should not be left unmentioned that the bulk of Workmen's Compensation cases are heard before County Court judges. The history of how this came about is an extremely interesting illustration of the tendency of money-power to exercise its influence, and of the hopelessness of legislative effort in the face of such tendencies. When Workmen's Compensation was first introduced, it was hoped and believed that its procedure would be very short and simple. The Act contemplated that questions which arose should be settled if possible by agreement (as, of course, in many cases they actually are). Failing agreement, they were to be settled by arbitration; and the first kind of arbitration contemplated was to come before a committee representative of the employer and his workmen, if one existed. This would be very short and simple, but there might not be any such committee, and in any case either party had a right to refuse this kind of arbitration. The next kind of arbitration contemplated was that of a single arbitrator agreed on by the parties. Only if no such agreement was reached was it contemplated that the matter would go to the

[1] Compare the similar treatment of criminal appeals, mentioned at p. 130.

County Court judge (who was still to sit as an arbitrator and not as a judge). All these praiseworthy efforts have in fact resulted in virtually every contested Workmen's Compensation case coming before the County Court judge, not because he is a better tribunal than the others might be—although it must be said that he is very often a good tribunal—but because the power of the purse would be nullified by any kind of informal or cheap procedure. The employer or his insurance company has an enormous advantage in money over the workman unless the latter is represented by his trade union, and even if he has been able to put himself in this position the employer has still some advantage. To use the power of the purse, it is no good going to a tribunal where neither side incurs appreciable expenditure; it is better to have one where the costs are substantial and—not unimportant either—where an appeal, in its turn expensive, will lie freely. (Appeals from the County Court judge sitting as arbitrator are simple and as of right; from the other tribunals contemplated they are limited and complicated.) The actual work of preparing and conducting a Workmen's Compensation case is described with some detail at pp. 140–3.

There still remains to be considered the County Court judge's most unpleasant and socially most important duty, that in connexion with the enforcement of judgments. The procedure is designed to compel debtors to pay their debts and at the same time to protect them from the disaster of having judgments enforced against them in large amounts. It is somewhat elaborate, and need only be stated in outline.

There is very little that corresponds to it in the High Court. In respect of all judgments for sums not exceeding £20, and in certain cases over that sum too, the judge must make an order for payment of the debt by monthly instalments, and the debtor can be brought before him again and again if necessary on "judgment summonses". The judge may raise or lower the amount of the instalments, according to his estimate of what the debtor can pay and in the light of the debtor's actual payments in the past. The judge may also, if satisfied that the debtor has been able to pay and has neglected to pay, in face of the order of the court, commit him to prison for contempt of court; the order often takes the form that the debtor is to go to prison unless such and such a sum is paid each month. The scene in County Courts in many districts on "judgment summons day" is often heart-rending, and in some courts men are sent to prison who really are not and have not been able to pay. Expenses are necessarily incurred by creditors in the effort to prove that their debtors can pay, and these will generally be added to the debt. A certain proportion of the debtors are of course extremely artful, and highly skilled in "dodging" their liabilities, and some few never pay unless they are ordered to go to prison, and never fail to pay if they are so ordered. Some of the judges very seldom make "committal orders", and a few make them quite light-heartedly. (The number committed annually averaged 3,559 from 1931 to 1935 inclusive.) On the whole, the County Court judges do the work well; the whole nature of their work tends to give them far greater opportunity than

most judges or barristers for obtaining some real insight into the lives and problems of the poor; but so important is this particular section of their work that it is no exaggeration to say that the ease with which credit can be obtained and the vigour with which the sale by canvassers of hire-purchase or other instalment goods will be pressed in any particular district will depend to a substantial extent on the attitude of the County Court judge to the enforcement of judgments.

It is now time to examine the Criminal procedure, which is very different from the Civil procedure, and interesting largely by reason of those very differences.

To take first the police courts (petty-sessional courts) and to begin with the offences which are dealt with summarily,[1] without any question arising of their being committed for trial, the procedure in these cases, which are extremely numerous but in their overwhelming majority quite trivial,[2] is the same, roughly speaking, as in the simpler cases in the County Court; the only form of "pleading" is that the defendant is charged and asked whether he pleads guilty or not guilty; the prosecutor (who need not necessarily be the police, for private persons can prosecute and in minor cases, especially assault, they often do) with or without opening his case calls his witnesses, who are cross-examined in the usual way, and the defendant with or without a speech calls his. Perhaps the most frequent abuse in these cases is the refusal of an adjournment to a defendant who says he can get witnesses and wants to call them but has not had time in the 24 hours or less that have elapsed since

[1] See p. 17. [2] See p. 203.

his arrest to get in touch with them. This is quite inexcusable in a genuine case, and happens much too often. Justices ought not in any case lightly to assume that a defence is not genuine when they have only heard the prosecution.

Next there should be considered the procedure in respect of "indictable offences", which will normally be committed for trial. The proceedings in these cases are not strictly a trial at all, and no decision can be come to other than a decision that there is or is not a case fit to be tried on indictment. But to the layman it looks like a trial. The accused is of course present. The prosecution open the case if it is of sufficient complexity, and call witnesses in the usual way. The defence can cross-examine the witnesses, but the accused must not even be asked what he has to say or whether he pleads guilty or not until the prosecution's case is closed and the examining justices can make up their minds whether there is a case for him to answer or not. If they do not think that there is such a case, they should dismiss the charge. If they think that there is, the accused can by himself or his solicitor or counsel argue that there is not, or can then and there call evidence to show that, looked at as a whole, the case is too weak to be sent to a jury. But this course is rarely adopted, and is rarely wise; it gives the prosecution full knowledge of the defence, and it does not often persuade the justices to reject a case which they have already said should go for trial, and which they do not care to take the responsibility of rejecting. Once they have definitely ruled that the case is to be committed, there is nothing further to be done in the

police court, except to deal with the question of bail. The law relating to bail, that is, to the release of the accused on the undertaking (called "recognisances") of themselves or of other persons of some measure of financial stability (called sureties) to forfeit a sum of money if they do not appear to be tried, is complicated, uncertain, and not easy to state in summary form. Release on bail is rarely or never granted in respect to charges of treason or murder, but in all other cases it is usually available at some stage or another and on some conditions or others. Apart from the case of persons arrested without warrant on trivial charges, who can be and normally are released on bail by the police, without any order from the magistrates, there are two stages at which magistrates are commonly asked to grant bail, the first during the hearing before them and prior to committal for trial, and the second on or after committal. The general principle which should be followed is that all persons should be admitted to bail, on reasonable amounts, so long as there is no reason to anticipate that they will not appear to stand their trial; but in actual practice the courts fall well behind this standard, and a good many persons who could safely be released remain in custody either because bail is refused, or because it is fixed at such a figure that they cannot find sureties. Every person who is so kept in custody and is afterwards acquitted suffers the grave injustice of being deprived of his liberty for no reason, and for no compensation, perhaps for many weeks, for although our procedure is better than that of most countries in ensuring that cases are brought to trial without delay, still at

certain periods and in certain districts some weeks will elapse between the committal and the trial at Assizes or Quarter Sessions, apart altogether from the weeks that the proceedings before committal may have occupied. This is the sort of injustice we expect the poor, who are mainly concerned, to put up with silently.

During the proceedings prior to committal, it is not too easy to get bail. Magistrates in a great many courts are reluctant to grant bail unless the police consent, and the police often oppose it, not in any real belief that the accused will abscond, nor necessarily (to do them justice) merely because they know it is substantially more difficult for him to communicate with his solicitor and prepare his defence so long as he is in custody, but simply because they hope that, so long as he is in their charge, prolonged questioning may lead to his making disclosures which will help towards his conviction. The common phrases "the police have not yet completed their enquiries", and "enquiries are still proceeding", which are in many cases sufficient automatically to lead magistrates not to give bail prior to committal, too often refer to enquiries proposed to be made by the police of the accused himself whilst in custody.

After committal, bail is normally granted, but it of course may be fixed too high, or the accused may in any case be unable to find anyone to act as his surety.

It is often objected to complaints that justices have refused bail, or fixed it too high, that there is always a right to apply to a High Court judge "in chambers"

(i.e., sitting in private) for bail.[1] This is like telling an evicted cottager that he need not be homeless, for he can always go to a hotel; the ordinary accused person, even if he knows of this right or has a solicitor to inform him, cannot usually afford the expense of making such an application.

Before passing from the police court, it is necessary to examine two hybrid types of charges, firstly those which although they should normally be tried on indictment can be tried summarily, and secondly those which although triable summarily can at the instance of the defendant be committed for trial. The first of these classes includes all charges against children under 14, unless they are charges of homicide, or unless a person over 14 is charged jointly with the child under 14 and is committed for trial. Subject to these two exceptions, the charge against the child *must* be dealt with summarily, and even in the latter of the two exceptions it may be. (Just so that no one shall suspect that we are being too tender-hearted to criminals under 14, a special power is given to punish them additionally with a whipping, but not if they are girls and only once anyhow. The members of our precious governing class cheerfully explain that *they* were whipped at school; but their outlook, appearance and habits are only one of the many arguments against the continuance of this disgusting practice.)

[1] It is a curious thing that, whilst in general the greatest importance is attached to the proceedings of a court being carried on in public, a certain number of judicial proceedings, including some that may involve imprisonment, are heard in private, and indeed that anyone disclosing what was said in such proceedings may be imprisoned for contempt of court.

The next class of charges of indictable offences which may be dealt with summarily comprises all charges except homicide made against persons between 14 and 17. In these cases the justices may if they think fit deal with the charge summarily, but only if the accused consents. In order to give the accused the opportunity to consent, they must reduce the charge to writing and read it to the accused, adding: "Do you wish to be tried by a jury, or do you consent to the case being dealt with summarily?" They may, but are not bound to, explain to the accused as best they can what all this means; very often they do not; and the accused, who is probably bewildered by his or her surroundings and is at most under 17 years of age, has then and there to make up his or her mind what to do, generally without being able to get advice. There are innumerable considerations that ought to be regarded,- which court will give the best hearing, which is most likely to acquit, which will give the heaviest sentence, which will probably grant legal aid,[1] how long one will have to wait for the jury trial, whether one will get bail. On the result of the case the child's whole future will depend, for few people go to prison and succeed in running straight afterwards; but no real effort is made to give help at this vital moment.

The last class of indictable offence triable summarily covers a long list of offences where the accused is an adult (i.e., a person not less than 17). Here, if the justices think the case is not of so serious a nature that it ought to be committed for trial, and if the

[1] See pp. 191–209.

accused consents, the case may be dealt with summarily. (On an average, no less than 80% of the indictable offences tried in England and Wales, excluding those which are bound to be tried in juvenile courts, are in fact tried by the magistrates under this procedure.) The same question as is quoted above must of course be asked of the accused, and an explanation may be added as in that case. The same observations apply as to the circumstances in which the accused has to make up his mind, except that in this case the accused is at any rate over 16 and may of course be grown up.

There is then the reverse type of case, that in every case (except assault) where the justices have power to award imprisonment for more than three months, the accused if not under 14 has a right at the beginning of the proceedings to demand a trial by jury, and the case has then to be dealt with in every respect as an indictable offence. The primary purpose of this is to give the right to demand trial by jury to those who object to being tried by justices; whether the orthodox view that trial by jury is a universal boon be right or not, it is obviously to the advantage of the accused to have the option, if he is in a position to exercise it wisely. In order to give him the opportunity to exercise this right, the court must say to him: "You are charged with an offence in respect of the commission of which you are entitled, if you desire it, instead of being dealt with summarily, to be tried by a jury; do you desire to be tried by a jury?" It may not be quite as unintelligible to the puzzled citizen in the dock as the remark which a County Court judge once made to a working-

man seeking to represent his brother, the defendant, who could not leave his work to attend the court, "Well, you have no locus standi, but I will hear you as amicus curiae"; but, even with the explanation which the court may but is not bound to add, it is still subject to the criticisms made above on the similar situation of persons who may be tried summarily for an indictable offence.

It is at this stage, perhaps, worth while to compare the criminal procedure with the civil in the matter of preparation of the case, pleadings, discovery of documents, etc. There is at no stage any power to order discovery. As to discovery from the accused, it would not be thought right to make him assist the prosecution in this way—there is an old tradition, developed probably from the days when most convicted persons were hanged, that you should not make the accused contribute anything directly towards his own condemnation, a tradition which of course does not prevent prisoners, subject to certain safeguards, being exhaustively cross-examined by the police whilst in custody—; but the police can take the precaution of arresting him in the premises where his documents are, and thereby acquiring the right to search these premises and take any document they find that are relevant to the charges they propose to make; they have also in some cases power to get a search warrant to find evidence. As to discovery for the accused against the prosecution, there is no such thing, but it is the duty of the prosecution in indictable cases to produce in the preliminary proceedings in the police court all the documents on which they propose to rely,

and in theory they certainly ought not to suppress any relevant documents. There does of course exist the right in the accused as well as in the prosecution to have "subpoenas" granted directing any person who has a relevant document in his possession to produce it in court, but that is of substantially less value than the right to see a document not merely at the trial but before, and the right not merely to demand a document of whose existence you happen to know but also to be shown all relevant documents. Interrogatories are of course unknown; it would be no good addressing them to the prosecutor who of his own knowledge really knows nothing, and to address them to the prisoner would be against the tradition.

Pleadings, technically, consist in the indictment on the one hand and the accused's oral plea of guilty or not guilty on the other; (the only case where the defence puts in a written plea is in justification in criminal prosecutions for libel). This primitive and simple method of pleading dates of course from the time when most prisoners were illiterate.

At this stage, some comment might be made on the system of preliminary proceedings in the police court, followed by the actual trial at Assizes or Quarter Sessions. To an accused who is employing solicitor and counsel to defend him, it has the disadvantage of practically doubling the expense, and it also has the disadvantage, in cases possessing any "news-value", that the proceedings at the police court, often including a good deal of evidence which the strict application of the rules of evidence at the trial (and they are then normally pretty strictly applied)

will wholly exclude as improper to be heard by the jury, will have been widely reported and widely read, so that the jury will consist of people who ought in theory to know nothing of the case and to hear it freshly related to them but who in practice have a more or less inaccurate picture of the matter in their minds, including parts that they ought not to see at all. But there are compensating advantages, for the accused does by this procedure learn very fully the case against him. He has not merely a statement of the evidence for the prosecution; he has seen the witnesses give their evidence at the police court and knows the sort of persons they are, and he has even cross-examined them or had them cross-examined by his solicitor or counsel if it has been thought wise. He also has seen, and if he wants it, has a copy of every document the prosecution proposes to use. (It is true that the prosecution can adduce additional evidence at the trial if they wish; but they ought not to keep back witnesses if they are available at the time of the police court proceedings, and they must in any case give notice of the proposed new witnesses and a short statement of the nature of the evidence they are to give.) For a man with plenty of money, this part of the system works well; for a man with a little money, badly; for others, neither very badly nor very well.

It is interesting to compare this system with that in vogue in most Continental countries. There, there are no proceedings in open court until the trial proper, but there are prolonged investigations in private of all possible witnesses, including the accused, and a

dossier is built up of all the statements of all these witnesses. In general, the accused is entitled to have his lawyer present when he is examined, and to refuse to answer questions, and is also entitled to peruse the whole dossier after it has been completed, as well as the indictment, which unlike ours is a long document containing practically the whole history of the case. The main differences between our system and that is that in the latter the accused is generally questioned more fully, being regarded indeed as one of the people who ought to contribute his knowledge to the general pool; whilst with us, although the accused is often questioned for long hours, his examination is a less prominent part of the preliminary proceedings. It is difficult to decide which system is best: both give occasion for abuse; both, however fairly worked, may cause prejudice to the accused person; and both offer him certain advantages and safeguards. It is at any rate safe to conclude that either system if worked fairly is better than the other if worked unfairly.

At long last, this description reaches the stage of the trial before the jury at the Assizes or Quarter Sessions. Except that at Assizes the High Court judge is the sole judge, whilst at Quarter Sessions there is a Bench of magistrates, whose chairman presides and does most of the actual work, including the summing-up, there is not much difference between the two.

The procedure is not really dissimilar from that of a civil action with a jury in the High Court. The prosecuting counsel opens the case to the jury, and calls his witnesses, who are examined and cross-examined, the rules of evidence being very strictly

followed. If the accused gives evidence, he should do so before any other witnesses he may be calling, although he is not actually bound to do so. If he is not calling any other witnesses, he gives evidence immediately after the evidence for the prosecution has finished. There is a most elaborate series of rules as to the order of speeches, the governing principle of which is that the defence loses the right to make the final speech *after* the prosecuting counsel's final speech if it calls any evidence or puts in any document, but the accused himself and any witnesses who speak to his character only are not counted as witnesses in this calculation. If the accused is not called as a witness, the prosecution must not comment on this, but the judge may; if the accused is called as a witness, he is not to be cross-examined as to his previous convictions or bad character ("to credit")[1] unless he has given evidence of his good character or in certain other exceptional cases.

The judge sums up to the jury, and they return their verdict. If the accused is acquitted, it is only in the rarest possible cases that he is given any costs, and he is never given any compensation for the period that he may have been in prison awaiting trial. (This abominable injustice has lasted for centuries; if members of the ruling class were indicted more frequently and found not guilty, it would soon be altered.) If the accused is found guilty, a police officer goes into the witness-box and, all the rules of evidence being definitely and completely abandoned, gives a hearsay account of the convicted man's career. With

[1] See p. 102.

that material before him, and with what he has seen of the man in the dock during the trial, the judge sentences him, generally preceding the sentence with a homily. He may bind him over to come up for judgment if called upon; he may put him on probation; he may give him a short sentence, or a long one; if he is sufficiently youthful, he may send him to a Borstal Institution; and in a fairly wide and miscellaneous selection of cases he may order him to be flogged. Many judges and chairmen of Quarter Sessions are humane. Some are of a certain age. Probably not one has studied criminology or psychology. Perhaps 10% will in the past have practised substantially in criminal cases, before similar judges with a similar procedure. Most of them will have visited a prison at least once. Scarcely any of them will have served a term of imprisonment or will know what its effects are or are intended to be. Probably none of them will have worked for £3 a week, or lived on the dole, or indeed in working-class surroundings at all. Very very few of them will have any real understanding of the convicted man's outlook, difficulties, temptations, hopes, fears, strength or weakness. But, without any aid or consultation with criminological experts or anyone else, they will pass sentence, after a few minutes' or at most a few hours' delay. And they would probably not find it easy to explain exactly why they had given precisely that sentence and not a shorter or longer one. The man's whole future -whether he becomes a violent criminal or only a petty and gentle one (prison is almost a guarantee that he will become a criminal of some sort), or whether he becomes a useful citizen,

whether his wife and children will be happy or miserable, fed or starved—all depends on those few moments' consideration, based on the hearsay statement which the police officer has given. And then the next case is called on. Yet our social "system" has lasted a long time, and will probably last another decade.

Much the same observations, of course, apply to sentences passed in the police courts, although the whole business there is on a simpler and a smaller scale; but those courts have defects of their own. To begin with, in awarding fines, which of course form a large part of the penalties they inflict, they seldom make any enquiry into the means of the accused, so that a fine of say 40*s.* will be imposed on each of two men for substantially the same offence when it will represent for one of them and his family complete penury for a week or longer, and for the other no particular inconvenience. It was laid down as long ago as 1914, by section 5 of the Criminal Justice Administration Act of that year, that the magistrates, "in fixing the amount of any fine . . . shall take into consideration, amongst other things, the means of the offender as far as they appear or are known to the court." This was something, but it did not positively direct the court to inform itself on the subject, and it made very little difference in practice. In a circular sent out to justices by the Home Office in November, 1935, the importance was emphasised of regard being had to the means of persons on whom fines were imposed. But it remains true that in the vast majority of cases fines are imposed without such enquiry, and

no difference is made between offenders of obviously widely different means. The evil effects of this are mitigated by the provisions, stated below, for securing that no person shall go to prison on default of paying his fine without a proper investigation of his means.

A cognate evil is that of sending persons to prison in default of payment of fines, or of moneys due for wife-maintenance, affiliation, or rates. This is not only interesting from the point of view of the amount of unnecessary hardship and social waste involved in sending people to prison when at the worst they have not committed any offence which the court regards as necessary in the first instance to be punished by imprisonment, and at the best have done nothing save to fail to pay what is in essence a civil debt; it is equally interesting in its recent history as showing how easily a substantial measure of reform can be achieved with quite modest machinery if only a little trouble be taken. Consider first the question of persons fined for minor criminal offences. The practice has always been to impose a term of imprisonment to be served if the fine is not paid. The most desirable course from every point of view is, naturally, that the fine should be paid and that such offenders should not go to prison at all, and save in cases where some question of political or religious principle arises probably no one would serve the term of imprisonment if without too much hardship he could find the money to pay the fine. The practice for many years was to hold the convicted person in custody from the moment of sentence until the fine should be paid. It is plain, of course, that in innumerable cases the man would

be able to pay the fine if he were only given a little time to look round and earn or even borrow the money, and as long ago as 1879, by section 7 of the Summary Jurisdiction Act of that year, power was given to the courts to allow time for the payment of fines. But little or no use was made of that power, which was only a power and not an obligation; and as a result, as recently as 1910, no less than 85,366 people were sent to prison in the one year in default of payment of fines. However, in 1914, by the Criminal Justice Administration Act already mentioned, it was laid down that, save in certain excepted cases, time *must* be given for payment. This effected a considerable improvement, although the evil was not wholly cured. In 1932, 11,244 were committed to prison in default of paying fines; this looks bad enough, but in comparison with the number of persons on whom fines are actually imposed in each year (437,834 in 1932) or with the number of 85,366 mentioned above, it seems pretty satisfactory. But it is more encouraging to observe the results of the recommendations of the Departmental Committee above-mentioned and, still more, those of the Money Payments (Justices Procedure) Act, 1935, which adopted in statutory form some of those recommendations. Briefly, the effect of that Act, which came into force on the 1st January, 1936, so far as concerns those who default in paying fines or rates, is that instead of the party being committed almost automatically on non-payment,[1] the

[1] One result of this practice of automatic committal was that in courts which did not notify persons fined in their absence, unless they sent stamped addressed envelopes, the first the offender knew of the result of the case was the arrival of the police officer with a warrant

sentence of imprisonment in default is now, normally speaking, not even given at the time the fine is imposed, and defaulters are summoned to appear before the justices, who have to consider their means and make up their minds whether in all the circumstances it is necessary to send them to prison. With regard to failure to pay maintenance or affiliation orders, the justices are given certain powers of remission of arrears, and may not commit to prison when they are satisfied that the failure to pay was not due to wilful refusal or culpable neglect. The actual results in statistics of persons imprisoned as a result of default in these various forms of payment in the years 1932 (before the Committee sat), 1935 (after it had made its report and recommendations) and 1936 (during which year the Act itself was in force), are as follows:—

	1932	1935	1936
In default of payment of fine	11,244	10,825	7,424
Non-payment of rates	3,089	2,118	1,464
Wife-maintenance arrears	3,648	2,324	1,876
Affiliation arrears	2,435	1,300	859
	20,416	16,567	11,623

These are very remarkable results. It may be only tinkering, but it is good tinkering, and one is moved to wonder whether other tinkering might not be equally useful. But it still leaves so many people in prison in respect of non-payment of money that, if one adds

to take him to prison. The Act of 1935 compels the court to notify every person fined in his absence.

also the number of people committed by County Courts, half the prison population at any given moment are persons who would be at liberty if only they had paid sums of money.

A moment might be given to the consideration of the possibility of innocent men being convicted. This is another point at which the invincible complacency of the middle class puts on its infuriating grin. "Error? Oh! No! Our system is perfect. There can't be error." At least one man has been found guilty in the lifetime of many readers of this book, in an Assize Court, of murder to which the real culprit afterwards confessed. Adolf Beck was twice convicted of serious offences on apparently very good evidence, and turned out to be wholly innocent. Cases occur every year in which the innocence of convicted persons is established and they are released and compensated. Men sentenced to death for murder are often reprieved and kept in prison for 20 years or so because it is realised that they may be innocent. But still our precious rulers are quite sure no mistake is ever made in criminal courts. Why should they think so? Everybody makes mistakes, and human observation and memory are notoriously uncertain and unreliable. Verdict after verdict in civil cases is set aside as perverse or unreasonable, and the juries in civil cases are just as good as those in criminal cases. Hundreds of times at Assizes, counsel of great experience waiting for a verdict will think a man ought to be acquitted, that he will be; the jury often come back with a verdict of guilty; are they right every time? Few opinions as widely held as this "infallibility of juries" have had as little justification.

And the social injustice of branding innocent men as criminals and sending them to brood over the injustice in a lonely cell is as appalling as its material consequences, direct and indirect.

Facilities for appeal in criminal cases have always been scanty and full of technicalities, but have been improved substantially in recent times. It is now possible to appeal in all cases from the decisions of justices trying cases summarily to the Court of Quarter Sessions. The procedure used to be so complicated and technical as to be almost unworkable; it has been simplified recently but is still somewhat complicated. It is not satisfactory, as it comes before a group of the same justices, except in boroughs which have a Recorder; it is not much used, largely because it is expensive; and it sometimes works injustice on the prosecution as well as on the appellant, because it takes the form of a re-hearing of all the evidence and so each side must get all its witnesses to attend the court again, which is not always possible. When points of law arise in cases tried summarily (or, now, in cases heard at Quarter Sessions on appeal from magistrates in Petty Sessions) they can be taken either by the prosecution or by the accused to the High Court by "case stated"; that is, the justices draw up a statement of the facts, on which the point of law must be argued. This procedure is sometimes valuable, but it is unsatisfactory in several ways; it is slow and expensive, but above all the fact that the argument is absolutely confined to the facts as stated by the justices leads only too often to the case being, as lawyers say, "stated out of court" by the justices setting out the facts

in a way which it is difficult to recognise as wholly accurate.

Appeals from convictions at Quarter Sessions and Assizes, for which no real provision existed until 1910, now go to the Court of Criminal Appeal, which is staffed by the judges of the King's Bench Division. The appeal lies of right on points of law, but on questions of fact it is necessary to obtain leave. Appeals from the Court of Criminal Appeal itself to the House of Lords are allowed only on a certificate by the Attorney-General that a point of law of exceptional importance is involved. The comparison between the wide facilities for appeal in civil cases and the still very limited rights of criminal appeal is just what would be expected.[1]

A word should be written on the question of delay. "The law's delays" are proverbial, and in all countries and at all times complaints are made of them. What is the position in England? So far as concerns the criminal law, it must be stated in its favour that both with regard to the requirements of bringing before a public court without delay any person arrested, and with regard to the larger question of bringing cases to trial promptly, our procedure is much better than that of most countries. There are occasional serious delays, but they grow rarer, and minor reforms to avoid them are constantly being introduced. Indeed, the only grave complaint remaining on this point is the absence of compensation for those kept in custody pending trial and then acquitted. With regard to civil litigation, where the evil of delay, although it does

[1] Compare p. 108.

not involve deprivation of liberty, may often be very serious, especially when the parties litigating are of very unequal resources,[1] the position is not so satisfactory. In County Courts, at Assizes, and in the smaller litigation in the High Court where the procedure has been reformed and simplified recently ("New Procedure") the delays are not substantial; but in heavier litigation the amount of time that may be spent in preliminary proceedings, the delay due to congestion in the lists for hearing,[2] and the delays that may be caused by appeals, are definitely serious. They are not as bad as in some other countries; they are not as bad as they have been in this country at other times, but they are bad enough to amount only too often to a denial of justice. In a heavy action, eighteen months or even longer will often elapse between the institution of the action and the hearing at first instance. Litigants often compromise, or even refuse to bring actions, on this ground alone.

It is a curious illustration of the strongly-entrenched position of the whole legal profession, and of its resultant relative indifference to the public convenience, that it has never allowed the arrears or delays to affect its holidays. The High Court sits five hours a day for five days a week and has 16 weeks in the year as vacations. During those vacations, only the most urgent cases can be heard, and the most that has ever been done as a concession in periods of arrears has been to give up eight or ten days out of the ten weeks of the summer Vacation.

[1] See pp. 134–6. [2] See pp. 32–3.

CHAPTER VI

EQUALITY BEFORE THE LAW

EQUALITY BEFORE THE law is an old topic of controversy. It is not the subject of this chapter to cover the consideration of the provision of aid for poor people in the conduct of their cases or in defending themselves against criminal charges, nor the operation of the law in its bearing on political charges, which are dealt with in the three subsequent chapters. Here the topic of equality is considered rather in its relations to the whole social and political background.

Inequality before the law is seldom brought about in Western countries by direct legislative provisions. That would be too crude. Anatole France has reminded us that "the law with a majestic impartiality forbids the rich and the poor alike to starve to death, or to sleep under bridges", and the Vagrancy Acts[1] in terms apply to the whole community. The modern writer who told us that "The courts are open to all citizens, like the Ritz hotel" probably knew that he was only adapting a saying of Dr. Johnson. (Indeed, where legislation is to be found dealing expressly with the working class only, it is often beneficial legislation like the Workmen's Compensation Act—the ambulance work of capitalism.) Inequality before the law is in truth just one more example of the fundamental inequality that pervades and corrupts the whole of life under capitalism and the class system. It is not that

[1] See pp. 83–8.

judges and lawyers consciously want to treat the poor differently from the rich; many of them even strive consciously to avoid doing so. It is simply that life treats them so. and it is so usual and natural, so much a part of the whole pattern, that it is hardly noticed, even by the victims themselves. It is no more reasonable to expect true equality before the law in our present system than it is to expect a sunny day in December at the North Pole; as absurd, in short, to talk of the same law for the rich and the poor as of the same life for the rich and the poor. If some grievance weighs on the middle classes, they become vocal, and the matter is gradually remedied; but it may hurt the working classes for generations and little will be done. (The motor cars of the present day have easy gear-changes, a nice wind-screen, and a hundred and one other devices to make driving pleasant; they are so fool-proof that the middle classes can drive them. But they started without even a wind-screen, and with many other difficulties which made driving a highly skilled and arduous job; and if no one had ever been put to driving them except workmen they would still be as difficult as railway engines.)

The inequality that results from the system varies, perhaps a little from one capitalist country to another. In some respects it is a trifle worse in England than elsewhere, because our distribution of wealth is even worse than most, and our class-distinctions cut deeper. It is not that our class-distinctions are rigidly defined by law, or that the individual cannot pass from one class to another. A lucky gamble or a lucky swindle may provide money; money can buy a title or some

other entry into a higher class, often called "Society" although somewhat anti-social; scruples or the lack of them, modesty or its opposite, a bad accent or a good press-agent, good lawn-tennis or cricket, right politics or left politics, bad education at one of the private establishments called "public schools" or good education at a county school; all these things may aid or compel one to remain in one class or to go up or down to another. But the essence remains that, in whatever class you happen to be, your whole outlook, and the treatment you will get from the public, will be inescapably fixed and conditioned by your class; and the law will not be an exception.

The deliberate exercise of the power of money is by no means the whole story. It is no more than a major symptom of the disease. But it does cover a great part of the field, cause an immeasurable amount of harm, and illustrate vividly the whole general trouble. When two litigants of unequal resources face one another, what happens? The stronger, a rich corporation, an insurance company, or even a rich individual, has many weapons, and some of the peculiarities of our law seem to sharpen them for him. He can employ a more experienced and resourceful solicitor, and can afford to pay him to give more of his time to the matter; his case will be better prepared, and in any negotiation or conflict between the solicitors the handicap will be in his favour. He can employ more experienced counsel, and it must not be forgotten that the forensic skill of counsel very often determines the issue of a case one way or the other. He can have a K.C. where the other must be content with a junior

barrister; and, however regrettable it may be, and however hard the court may strive to overcome it, it is a well-established psychological fact that a K.C., unless he is very bad, gets a better hearing than a junior; in most courts, as a very symbol of inequality, he sits in a separate bench in front of the junior counsel. If the weaker man can afford a K.C., the strong man affords two, or a more distinguished one. Indeed, in technical or specialised litigation where there are only three or four counsel well acquainted with the work, the strong man can and often does employ them all, leaving his opponent to hire what amounts to a well-meaning amateur. The considerable additional expense which is the gravest disadvantage of our system of separating the legal profession into two branches is itself an extra weapon for him.

The possibilities of the rich litigant are not yet nearly exhausted. The elaborate nature of our procedure plays into his hands again. He may cause endless expense (and delay, which is sometimes as bad) by prolonged proceedings in "discovery"; the strictness of the laws of evidence, calling for more witnesses or documents to prove this or that, hinders him very little and his opponent a great deal. When the case comes to trial, the poor man may well win on the merits of his case, overcoming the handicap; and the rich man can then appeal, causing more delay and nearly doubling the expense, whereas if the poor man loses when he really ought to win, which happens constantly, for nearly half the cases that go to appeal are successful, he cannot afford to appeal. The very uncertainty which is inherent in all litigation

helps the rich again, particularly because it makes appeals so much more formidable a weapon.

Nowhere perhaps has the power of the long purse been so widely or relentlessly exploited as by certain of the insurance companies which deal with claims for damages or compensation arising out of accidents. Many large corporations in different branches of capitalist activity seem to behave pretty ruthlessly at times, but the less scrupulous insurance companies present, or at any rate present more obviously, all the worst features of the strong man armed, keeping his goods and as much as possible of everybody else's. By virtue of prolonged and accumulated experience, they are extremely well equipped for the work of negotiating settlements, preparing and fighting cases, conducting appeals—in short, the whole elaborate business of ensuring so far as possible that few victims of accidents shall be adequately compensated. Every trick, every technicality, every delay and hindrance, often enough every misrepresentation, that trained and perverted minds can devise are applied in the sacred interests of profit with such unsparing inhumanity that the whole unequal battle of accident litigation, of tremendous human and social importance, seems to be a microcosm of capitalism in its worst aspect. So bad, indeed, has it become of recent years that judges of rigid conservative outlook have been heard to express the view that all accident insurance should be taken over by the State. Space does not permit of any prolonged discussion here of the tactics of insurance companies, but one illustration might be given, which arose recently in a Workmen's Compensation case.

As is well-known, the principle of this form of compensation, so far as concerns workmen who are incapacitated by injury, is that they should receive from their employer (which generally means, in fact, from his insurance company) not one lump sum of compensation but a weekly payment during incapacity. It is lawful, however, to make an agreement to accept a lump sum in discharge of the right to receive weekly payments. The insurance companies, good or bad, like to get rid of their liabilities by a lump sum, and it is sometimes, but by no means always, an advantage to the workmen to accept it; but it has long been provided by law, in an attempt to safeguard workmen against the persuasions of insurance agents, that no such agreement shall be binding unless it is approved by the Registrar of the County Court. (The result, in some districts, is that the knowledge of the sort of sum the Registrar is likely to approve leads to a proper offer being made by insurance companies who would otherwise willingly and easily persuade the injured and impoverished workman to accept a very much smaller sum.) In the case in question, the Registrar had refused to sanction an agreement which the plausible agent had coaxed the workman into accepting, and the workman ought accordingly either to have been left in receipt of his weekly payments or to have been offered a larger sum in settlement. But the agent was ingenious as well as plausible. Instead of increasing his offer, he persuaded the workman, who was of course most anxious to put his hands without delay on a sum of money which seemed very large to him, to remove to another district at the insurance company's

expense. In this other district, the agent from his accumulated experience thought that the court would take a different view and sanction the settlement; but happily the trick was detected and failed.

The whole of this tremendous inequality, it has to be remembered, has its effect not only in cases which are tried out, but in those which are settled, and still more in cases which are never brought, either because when they are contemplated it is realised that the rich opponent can starve the plaintiff out before he even comes to trial, or because the resources of the poor are often not even equal to getting as far as the serious consideration of whether an action shall be brought. And there is a vicious circle; not only has the poor man to suffer injustice when he cannot fight, but when great corporations or others realise that the poor man cannot fight they bother little about legality, and load on to him further injustices for which he actually has a legal remedy if he could afford to exercise it. Injustices of this kind are not only a bitter grievance to their direct victims, they are also a grave social evil. Illustrations abound. For example, the law of "nuisance" provides roughly that if a noise or a smell is so bad as really to be utterly intolerable (if it is in short an "infernal nuisance"), the sufferers can obtain damages and an injunction to prevent a continuance or repetition of it. Such actions are most salutary, for prolonged nuisance can gradually destroy the nervous system. The working classes have nerves—and more cause than most people for feeling that their nerves can't stand much more—although many middle-class people quite unconsciously think either that they have

not or that they ought not to have. But whoever heard of a working-man or a group of working-men bringing a nuisance action? Such actions are generally long and costly. So the working classes go on year after year, decade after decade, having their lives rendered miserable by the reek and fumes of a burning pit-tip, or the incessant barking of dogs, or any one of a variety of nuisances which reasonably well-to-do people would stop in a few days or a few months. And the creators of nuisances save themselves time and trouble by relying on the impotence of the victims instead of bringing the nuisance to an end.

The situation is really the same in all litigation between the well-to-do and the working class. For example, any working-class tenant may find himself sued for possession of his flat or cottage, and may rely on the Rent Restriction Acts.[1] Such a case may involve costs of £30 to £50 on each side, and may be carried to the Court of Appeal where the costs may be between £50 and £100 on each side. If the average landlord, whether an individual or a company, has resources of £2,000 per annum, and the average tenant has resources of £2 15*s.* per week, the tenant if he fights and loses is ruined, and the landlord if he fights and loses suffers no real inconvenience. It may often be sound business for the landlord to fight a case where the chances are "even"; it can seldom be anything but disastrous for a tenant to risk fighting even when the odds are in his favour, and tenants probably very rarely fight from any motive save their utter inability to find anywhere else to live.

[1] See pp. 172 *et seq.*

It is not easy even for the most imaginative person who has had no direct experience of litigation to realise how extremely complicated and difficult the actual preparation and conduct of even a small case is under the elaborate procedure of our courts, even for skilled lawyers who spend their lives in the work, let alone the poor litigant who may find himself attempting to fight a case without legal assistance. It will be useful to state shortly the sort of work involved, selecting as an example an ordinary Workmen's Compensation case. The procedure, even in these cases, which as already mentioned, at pp. 108–9, were especially intended by the legislature to be conducted in as simple a fashion as possible, will generally involve the full preparation of the case by the solicitor (involving the marshalling, in many instances, of an apparently unnecessarily large number of witnesses, owing to the very strict requirements of the law of evidence) and then the transmission of the case, thus prepared, to a barrister who will actually conduct the case in court. To start with, the solicitor must get the injured workman, possibly with the aid of others who saw the accident, to recount as best he can the whole history of the matter, including an explanation of the work on which he was engaged, and the cause of the accident. Witnesses must be traced, and statements obtained from them. In most cases a medical report will be needed, in order to establish the degree of incapacity and to show that it arose from the accident; where the workman has been in hospital, the report of the doctors there can often be obtained only on payment of a fee of £2 2*s*. (It should be remembered

that, although it is generally essential to have this report in order to be able to decide whether the case should be brought or not, the law of evidence prevents it from being put in as evidence at the hearing; there, the doctor himself must be called to prove the facts stated in the report.) When the facts have been thus far collected and marshalled, the question must be considered whether, upon the facts thus ascertained, the workman has a good claim in law (or, it may be, whether his claim is so good that he ought to take the risk of refusing some offer which the employer or his insurance company has made). If there is doubt upon such matters, as there only too often is, it will often be necessary to obtain the advice of the barrister upon the case, at a fee which will not be less than £2 4*s*. 6*d*. If, on the whole, it appears that the case has reasonable prospects of success, and should be launched, proceedings are formally instituted by filling up a form of application for arbitration, and lodging it at the court; the employer's solicitor in due course delivers an Answer (a document which sets out what points the employer is raising and which of the workman's particulars are in dispute); this must be considered, and the papers should be sent to counsel again for advice on evidence (fee £2 4*s*. 6*d*.); any difficult medical questions are cleared up with the doctors, arrangements made for the workman to be medically examined again, and the doctors formally summoned by "subpoena" to attend; a general practitioner needs a fee of at least £2 2*s*. per day for attending court, and a specialist not less than £10 10*s*. a day, and sometimes considerably more. Seeing that

the insurance company or the employer's solicitors, in cases involving medical questions, as so many do, will probably bring a specialist, it is desirable for the workman also to bring a specialist to court. The arbitrator is bound to decide the case on the evidence before him, and he is more likely to be convinced by the evidence of a well-known specialist who can say he has seen thousands of cases of a particular injury, than by that of a practitioner who may only have treated a few cases of the kind in question in his life. Moreover, the specialist is frequently well accustomed to giving evidence and answering questions in cross-examination, while the general practitioner may be unconvincing through sheer nervousness and medico-legal inexperience. It may be desirable for the workman to have a medical referee to sit in court as an assessor with the judge; a fee of £3 3*s*. is payable on lodging the request for the Assessor; the witnesses need to be subpoenaed and their conduct money paid (an average case will need, say, two lay witnesses at 10*s*. each). Notices to admit and produce documents such as wages books and correspondence must be prepared and served; a copy of the correspondence must be prepared for the use of the Arbitrator; a "brief", that is, a full statement of the questions and evidence arising in the case, together with copies of the Application and particulars, the Answer, the medical reports, the witnesses statements and the correspondence, prepared for and delivered to counsel. Counsel's fee must be paid; the usual fee is £6 16*s*., but the insurance company will usually employ a counsel who command a fee of £8 18*s*. in the London

County Courts and £12 6s. or more in less accessible courts; and so the solicitor brings to court the workman, his two lay witnesses, his specialist, his ordinary doctor and counsel. The case is then opened to the Arbitrator, the witnesses are called, examined, cross-examined, and re-examined; speeches are made, and the Arbitrator then, or perhaps at a later date, delivers his award.

The work involved in a simple case, such as has been described, cannot of course be carried out efficiently by any uninstructed layman. In fact the practice as to what witnesses to call, and how to obtain the necessary evidence, can only be learned by experience. The handbook most generally used by lawyers in connection with Workmen's Compensation cases runs into many hundreds of pages and refers to innumerable decided cases. The special practice and procedure are governed in general by special rules, but many points are governed by the County Court Rules, which are numerous and not always easy to follow. It is clear from this very short and summary description of the elaborate work required for what is, from a lawyer's point of view, a very simple piece of litigation, that the power of the purse must play a very important part in insuring inequality in substantially the whole field of litigation.

Illustrations of quite a different type of inequality crop up from time to time. The public hears rumours of scandals in some big business. Some employee or ex-employee of the business makes some disclosure. He is immediately sued for libel. He has no money to fight. If he struggles along somehow, and seeks to

prove his case by discovery of the company's documents, expense is run up against him in contesting the discovery. Finally the case is brought into court, and his defence fails for want of the material he ought to have, and distinguished counsel on the other side speak strong words about reckless accusations. The man probably goes bankrupt, but what is more important is that after his experience no one else dare say a word. It may well be that in many such cases there is nothing in the rumours and the company is perfectly honourable; but sometimes the reverse is true, and one can at any rate be quite certain that when there is a real scandal to be concealed and the man who seeks to expose it is weak enough to be crushed, the opportunities that money gives will be used to break him in the law courts. There is a somewhat similar example in a certain foreign potentate who is anxious to maintain a good reputation in England. He is in truth a blackguard of a pretty bad type, and some hundreds if not thousands of people know enough of concrete facts against him to destroy his reputation for ever. But he has let it be quietly known that, if anyone attacks him, he will fight them in a libel action and spend as many thousands of pounds as may be necessary to run them to a standstill; and so far no one has publicly attacked him.

The power of the purse is sometimes curiously assisted by the case-law system. As the law is built up by judicial decision, and the decision depends on the arguments, a whole current of law may start from the trivial accident of selection of counsel in some case years before, and the rich litigant will have a

good chance of deflecting the current in his own favour. One oddly foolish bit of law, the doctrine of "common employment", which carried incalculable social evil in its train, may well have started in this way, although it was no doubt also due to the unconscious bias of the judges. The doctrine merits explanation, although it is rather a long story. Accidents are generally caused by someone's carelessness, which the law calls negligence. In the common law it is and always has been the rule that, if one individual by being careless when he owes a duty to take care causes damage to another, he is liable in damages to the injured party. That is very satisfactory when the careless man has any money, but most people have not; and the further rule was very early established that anyone who employs a servant to work for him—say, to drive a cart—is liable for the negligence of that servant in and about the work he is employed to do.[1] So far, so good; and if the law had remained like that, injured workmen might have been fairly well compensated, over at any rate most of the area of normal industrial injuries. For it follows logically from the above statement of the law that the ordinary run of industrial accidents, caused by the careless act

[1] There is another curious example of the privileged position of the Government in the rule that Government departments or Ministers are not regarded for the purpose of responsibilities of this kind as the employers of their subordinates, liable for their negligence. If the London Passenger Transport Board, by one of its drivers, should negligently injure you, you can sue the Board: but if the Postmaster-General, by one of his mail-van drivers, injures you, you cannot sue the Postmaster-General, for he can answer that he and the driver are both technically the servants of the Crown; and you cannot sue the Crown, because "the Crown can do no wrong". This iniquity is mitigated in ordinary practice, but the position is jealously preserved and may at any time create the greatest injustice.

of a workman (apart from the large group due to some negligence of the management or to neglect of the provisions of the Factory Act) would be accidents for which the employer of the careless workman would be liable to the injured workman. But, when such cases were actually brought, it was most alarming to the possessing class, to which the judges belonged, and whose reactions and prejudices unconsciously affected them as fully as the rest, for it foreshadowed large additional expenses which would reduce profits. Better that workmen who were injured should go with their wives and families to the tender mercies of the Poor Law, than that good money of the employer should be paid out; besides, all this idea of compensation would make them careless and increase the number of accidents, which are expensive anyhow. The solution of that problem was the invention (one can call it no less) about a century ago, of a doctrine of law to the effect that when a workman enters into the employment of a particular master he makes a contract by implication with that master that he, the workman, will accept and carry at his own charge all the risks of injury that may be caused to himself by the negligence of any other workman who is in the same employment, the "common employment" of the same master. The doctrine held undisputed sway, although of course there was plenty of litigation as to exactly how far it went, for many years, filling countless homes of injured men with misery and despair, destitution and starvation, frustration and agony of mind—with everything but actual rebellion —until the legislature began in the late eighties of

the last century to make little timid pecks at it. It is still the law to-day, almost as fully as it ever was, but its effects are now greatly limited by the fact that the injured workman can normally obtain some compensation under the Workmen's Compensation Acts.

There is a somewhat different area of law in which inequality between rich and poor, whilst less directly due to the economic system, is perhaps more visible to the uninstructed eye. That is the area in which Acts of Parliament forbid deliberately in the interests of the rich, or for the supposed moral benefit of the poor, activities which are confined to the poor. Some of the eighteenth-century legislation was worse than that of the nineteenth in this respect. A student of history a few centuries hence might be excused for thinking that in the view of our ruling classes two very anti-social activities were taking your furniture out of a house when you could not pay the rent and shooting partridges and rabbits on other men's lands. The poaching laws in particular display a barbarous selfishness. If a man is arrested on a charge of obtaining £100,000 by false pretences, the police have in strictness only a very limited right to search him; but in any highway street or public place a constable without even making any charge may search anyone whom he has good cause to suspect of coming from any land where he may have been poaching, and he may equally stop and search any cart in which he has good cause to suspect the presence of any game that has been poached. And, although many people know the announcement "Trespassers will be prosecuted" to be

just plain dishonesty, because simple trespass cannot be prosecuted, it is still the law, by section 31 of the Game Act, 1831, that if you are found on any land in the day-time in search or pursuit of "game" (or of any of a good variety of creatures not dignified enough to be "game", such as rabbits), the person having the shooting rights, or the occupier of the land, or anyone acting for them, may order you not only to quit the land but also to give your Christian name, surname, and address. If you refuse, or give "such a general description of your place of abode as to be illusory", or simply wilfully continue on the land, then the owner of the shooting rights, or the occupier, or the person acting for them, may forthwith arrest you and take you before a justice of the peace (who may or may not own the adjoining land), and he may fine you £5 and costs; but you have the comfort of knowing that not more than twelve hours may elapse before your arrestor brings you before a justice.

Again, the law relating to betting works out roughly to the result that any middle-class person who wants to bet off the racecourse can lawfully do so, because he bets on credit, but the working-class punter who has to put down his sixpence in cash, and his bookmaker, are criminals (unless of course the bookmaker is able to make reasonable arrangements with the local police). Many middle-class people will quite sincerely defend this class-legislation on the ground that it protects the poor from being thriftless enough to waste their money on betting, whilst of course the middle classes can afford to lose a little money and consequently do not need legislative protection.

Similar discriminative operation of the laws (and a similar "defence") are to be found in connexion with the laws relating to the consumption of what the law calls alcoholic liquor. The grandmotherly nonsense of the legislature and the courts, in their solicitude for the moral welfare of the workers whom their system cheats, robs, starves, bullies, and murders in Imperialist wars, was well illustrated by a case which came before the courts a few years ago. On a Whit-Monday evening, in a Suffolk village, a group of villagers, probably quite unconscious of the fact that they were making themselves into moral outcasts, had a game of "ten-pins" in the garden of the village inn. They made a match of it, much as their richers and betters might have done with some more lordly pastime, and subscribed 6*d*. each. The prize was a copper-kettle, and—dread thought—it had been supplied by the brewers to whom the inn belonged, the innkeeper of course being their tenant. The match went off happily; probably a few glasses of beer were quietly drunk, but there was no drunkenness. The innkeeper was thereupon charged before the justices with the crime of "suffering gaming to be carried on on his premises". He was convicted, fined £2, and made to pay £2 5*s*. 6*d*. in costs. He appealed to the High Court, where his conviction was affirmed, and His Majesty's judges, after explaining the law, added a word or two about these dreadful goings-on. One of them said: "It would be disastrous if we had been forced to come to an opposite conclusion. It would open the door to many ways of evading the law, and consequently the policy of the law (which is to prevent gaming, because it

is a means of the attraction of customers to the premises, there to indulge in further drinking) would be utterly defeated." Another judge pointed out that in a similar case in 1872 a very great judge had said: "If ginger beer were the stake the prosecution though well founded might perhaps be a foolish one, but where beer is the stake it is proper enough to prosecute."[1] The third pointed out that another great judge had said in 1832 that the view of Parliament was that the playing of games for money in public-houses was likely to lead to habits of intoxication, and yet another in 1889 had added: "If games, whether of chance or skill, are allowed to be played for money, the tendency is to encourage the spending of money in drink." If all or any of those judges, on their way home after that day's work, looked in at their clubs and had a game of bridge for 1*s.* a hundred, and a glass of whisky with it, no one thought the worse of them.

Another curious example of how unequally the same law will operate on different classes is to be found in bankruptcy. Bankruptcy is intended as much for the relief of persons loaded with debt as it is for the equal distribution of assets among creditors, and in its practical operation is a real benefit from that point of view. But the working-class debtor, worried almost to death over a load of indebtedness of £10, £15, or £20, has no escape. His debts remain due for ever unless by some miracle he pays them. The middle-class debtor who owes £100 or £10,000 gets rid of them by release in bankruptcy; no doubt bankruptcy is not

[1] Is this the source of the immortal phrase "beer and skittles"?

wholly pleasant, but it *is* a release. The working-class debtor can only go bankrupt if he first manages to run up debts of £50 and then gets hold of £5 in cash to pay the fee on filing his petition!

There is another class of case, where it is perhaps less the class bias of the courts than the advantage of having ample funds to expend on the defence that creates the difference between rich and poor. It often happens that members of the middle-class are prosecuted for theft, particularly from shops, and, with the help of expert evidence from professional men, advance a defence on psychological grounds, of kleptomania. In those and similar cases defendants are often acquitted where it is virtually certain that working-class defendants would be convicted; they have not the resources to procure the necessary evidence, and if they had, the unconscious feeling in the mind of the magistrates that, if once such a defence were allowed to prevail, every thief would advance it (coupled, too, in some cases with a deep if unconfessed and even unrecognised view that the working classes ought not to have psychological states) would lead to the rejection of the defence. Most critics think that the evil here is that a few middle-class people get acquitted when they ought to be convicted, and the working classes commonly resent such acquittal in much the same way as they do the acquittals of well-to-do defendants defended by eminent counsel in charges arising out of motor accidents. But the truer and more serious view may be, not that a few middle-class people are wrongly acquitted, but that many poorer people are wrongly convicted.

The last, and in some ways the most sinister example of the directly different treatment of different classes by the law, comes up in relation to sentences. Judges of all ranks, faced with the task of actually sending members of their own class to prison, which they suddenly realise is a pretty dreadful place, to which no gentleman should be asked to go, always show the greatest anxiety and discomfort. To be fair to them, they often strive hard to give a just sentence; but they are so shocked by having to send such persons—may be even "public-school men"—to prison that the well-known words about the disgrace being in itself sufficient punishment nearly always come out, and the sentence is much lighter than it would be for the working-class prisoner. (Is it no disgrace to a worker, among his fellows, to be convicted of this or that offence? If it is, why should only the middle-class prisoner get a discount for it? If it is not, then probably there is something wrong in the law, for the working class has a very good and simple code of honesty.)

CHAPTER VII

LEGAL AID FOR THE POOR LITIGANT

No study of our legal system is complete, of course, without a full explanation as to how and to what extent poor men get their cases presented in the courts; and few parts of such a study are more illuminating in the light they throw upon the scientifically perfect and inexorable fashion in which the inequality of the existing system takes toll of the poor man in litigation as in all other activities. Here, as elsewhere, the sympathetic middle-class person is lulled into the belief that all is well, whereas in truth the situation is really one of general scandal, relieved here and there by patchwork reforms either of the haphazard type appropriate to that slovenliness of thought and expression which is sometimes called the "genius of the English character", or else simply of the only sort that can be squeezed through a congested legislature in a reactionary period.

It will be better to deal firstly with legal aid in civil cases, and it will be as well at the start to deal with an objection that is often quite sincerely raised, namely, that the working class seldom need to litigate. Nothing could be further from the truth. As capitalism writhes in its death pangs, and more than half the time of the legislature is occupied in passing Acts to patch up the system and make it work after a fashion, by forbidding first this and then that natural development of the

system as being so anti-social that there would be a revolt if it were not checked (think, for example, of the necessity for passing Rent Restriction Acts to prevent the "free and natural play of economic forces" squeezing rents up to an intolerable height) and as too, the workers suffer ever more and more from the stresses and strains of the period of collapse, the litigation in which they are forced in one way or another to take part becomes ever more varied, more frequent, more complicated, and more important. The truth, indeed, is that the working classes imperatively need much more litigation and legal advice than they get, even more than most of them need more food; and one of the unacknowledged reasons for restricting the facilities for poor men's litigation is that, if they were really given adequate means for enforcing their rights or defending themselves against injustice, the courts would be choked with a huge volume of additional work, at an expense which the governing class is unwilling to face.

A few minutes' thought will remind one why how and where working-men come into voluntary or involuntary contact with the law, and need skilled help and advice. As workers, they may at any moment meet with an accident at work; and accidents are not the rare thing that the middle class is apt to imagine. They may, too, be involved in street accidents. As individuals, many of them are tenants of dwellings, and questions of the amount of rent payable under the Rent Restriction Acts, or of the right to eject them, arise with distressing frequency. As husbands or fathers, wives or mothers, they may like other people

be involved in divorce proceedings, separations, maintenance claims, affiliation cases. They may have all sorts of troubles and difficulties with the innumerable varieties of hire-purchase agreements and industrial insurances in which a great army of persuaders induces them to take part. They may have an infinite variety of disputes or doubts over pensions, national health insurance, unemployment pay or poor relief, and, finally, with or without justification, they may be accused of minor or major criminal offences, a form of litigation in which they have no option but to take part, whether actively or passively; their position in criminal cases will be dealt with in the next chapter.

The forms of legal aid available to a greater or less extent in these various cases merit detailed examination, and in the preparation of this part of this book the researches of the Haldane Club, that vigorous and growing society of lawyer-members of the Labour Party, which has been making a close investigation of the problem in the hope of finding a satisfactory temporary solution, have been of great assistance. Much of what follows is the product of the Club's marshalling of the facts of the situation, although it must not be held responsible for any of the statements made.

Accidents, whether happening at work or not, are perhaps worthy of the first place in this examination. Their disastrous social consequences, save in the rare cases where the compensation is really adequate in amount, are very striking. Accidents happen without warning to the sole or main support of a family. His income stops suddenly, and even if (as often happens)

weekly compensation payments are made without delay they are far lower than the earnings, and the family income, almost always perilously small, is thus reduced unexpectedly at the very moment when expenses are increased, either by the attempt to look after the injured man at home or by the cost of visits to the hospital and the purchase of food or other requirements of the patient there. And when, as is not infrequently the case, there is doubt or delay about the payment of compensation or damages, the case is infinitely worse. If for any reason legal proceedings have to be brought, the case will last for many months before any payment is obtained. Both our law and its procedure, as is explained elsewhere,[1] are extremely complicated, difficult, and uncertain in their application; and the law governing rights to compensation or damages for injury by accident is a medley of common law and statutes, imperfectly overlapping, and giving rise to many difficult questions of law and to uncertainty in dealing with questions of fact, even in cases covered by the Workmen's Compensation Acts. There often stands between the victim of an accident and the chance of recovering compensation a long and expensive struggle with an insurance company or public corporation to establish beyond reasonable doubt that the accident was caused by the negligence of some third party, to rebut the charge that the victim by his own negligence contributed in a material degree to the accident, or to show that even if he did so contribute the third party was nevertheless really responsible for the accident.

[1] See Chapters IV and V.

These questions will arise if the case is simple, but other and more complicated questions both of fact and law may well arise if the case happens to be difficult; and the proportion of cases giving rise to doubts and difficulties is extremely high. Even in connexion with the relatively broad and simple right to weekly compensation under the Workmen's Compensation Acts, to which a workman is entitled, irrespective of anyone's fault, whenever he is incapacitated by an accident "arising out of and in the course of his employment", innumerable disputes arise. There may be a dispute as to whether an accident happened at all, or whether, if one did happen, it arose out of and in the course of the employment; or as to whether the workman is still incapacitated or, if he has partially recovered, to what extent he is fit for light work; or, if he is fit for light work, whether owing to the state of the labour market he is unable to obtain light work. Moreover, it not infrequently happens that, by an accident at work, a workman is not merely presented with a clear right to receive weekly payments under the Workmen's Compensation Acts, but also, with a clear, or more or less clear, right to claim damages from his employer under the ordinary "common law" for negligence or breach of statutory duty, which will far exceed the value of his weekly payments. Very often, before he has had time to have skilled advice, a workman will have accepted payments under the Act and will thus have destroyed his right to claim the more advantageous damages. (Often, too, as a practical matter, men are driven to take the weekly payments because they cannot wait for their money, or

because they have no assistance to fight the necessary action.)

Even where no dispute may arise, there may be need for skilled legal aid owing to the employer seeking to negotiate for a settlement of the liability by a lump sum; in such a negotiation, unless the workman has the good fortune to belong to a union which has an efficient legal department, there is (as already mentioned at pp. 140–3) one more typical illustration of the inequality between rich and poor, and its consequences.

It can easily be seen from these illustrations that, unless the poor are provided fully with really adequate and skilful means of conducting their cases, they are in substance deprived of anything even remotely resembling justice, and lie open and defenceless in the face of almost any abuse to which their employers or exploiters may choose to expose them. It is thus important to state clearly what machinery does exist for thus helping them. In the first place, so far as concerns the County Courts, where practically all working-class litigation goes, there is no official machinery at all. The middle-class critic gasps on being told this, and retorts that he is sure the Government has set up a Poor Person's Department to help poor men conduct their cases. This answer is typical of the confusion naturally existing in the public mind about our complex legal system; but it also leads to the disclosure of an amazingly ingenious piece of conscious or unconscious hypocrisy. Establish a Poor Person's Department, still the popular clamour, send the less hard-hearted of the middle class to a

comfortable sleep again. Yes! By all means! But how to prevent the working classes, with their innumerable grievances, their half-buried causes of action, swamping the lawyers and the courts? The remedy was simplicity itself. Establish the system all right, but apply it only to the High Court and Court of Appeal. They are the courts that loom largest in the eye of the middle class, and they deal according to the best estimates with no more than 2½% of the litigation of the working class. Workmen's Compensation and Rent restriction cases must be taken in the County Court. All other cases, except divorce, that involve £100 or less can be taken in the County Court; and if they can be so taken the Poor Person's Department[1] will not normally give a certificate for them to come to the High Court. The result is that, apart from divorce (important, let it be agreed, but not the only ground of litigation known to the poor) and those accident cases which are likely to involve more than £100, the poor men's cases in the High Court are the oddments, and the vast general stream of actions in which they are involved, to say nothing of the uncounted and incalculable number of cases in which they ought to be able to sue but are never able even to start, are left without any official aid or encouragement. (Indeed, just to round off the hypocrisy, the poor litigant who brings a case in the County Court has to pay all the court fees before his case can be heard—there being no power at all to remit them--and these court fees in the County Court are in proportion more onerous than the corresponding fees in the High Court.) Small

[1] See p. 176.

wonder, in these circumstances, that our adroit chloroform Press advertises widely the comparatively rare cases where working men and women are able to fight cases right up to the House of Lords and win them. Such cases are generally carried through by the Trade Unions, but these bodies cannot cover more than a small part of the ground. (The actual working of the Poor Person's Department will be explained later in this chapter, at pp. 177 et seq., where divorce is dealt with.)

What does the workman do, in the absence of official help? The principal source of assistance, in such cases as workmen's compensation, is the Trade Union, to which about 25% of the wage-earning population belongs. Some of the unions fight many cases very well. Others tend, perhaps, to leave the cases too much and for too long in the hands of their local agents, who are not trained lawyers, and some of whom are not perhaps quite so efficient as they might be. Other workmen obtain help from their Approved Societies, whose position and interest in the matter may be shortly explained. Under the National Health Insurance Acts every workman is obliged to insure his health either direct with the Government or through an Approved Society. Very many insure with the Government direct, but thousands of course insure with Approved Societies. The Approved Societies usually have arrangements for assisting their members to bring legal proceedings under the Workmen's Compensation Acts. So long as the member is drawing workmen's compensation, he is not entitled to sickness benefit and in many cases it therefore pays the Society to see that his case is, where necessary, either fought

or settled. Experience has shown that, on the whole, the Approved Societies, with one or two notable exceptions, are not sufficiently staffed to enable them to investigate the many thousands of cases which come into their hands with that thoroughness with which the cases of wealthy clients are investigated by the more efficient firms of solicitors, and as a result numbers of cases which ought to be fought are either settled too cheaply or not sufficiently pressed. But when they do decide to fight a case, they generally fight it fairly well. And their staff have the advantage of a highly specialised knowledge of the practical working of the Acts. They suffer, however, like many agencies that seek to help poor litigants, from a tendency only to take up "winning" cases and to refuse to assist in doubtful cases. A large proportion are doubtful cases, many of which would probably succeed, and the usefulness of this form of legal assistance is thus very materially reduced.

Neither Trade Unions nor Approved Societies, of course, can cover the whole field of litigation. The Trade Unions in general cover little if anything more than claims arising out of accidents or other difficulties connected with the employment of their members, and Approved Societies can seldom go beyond claims which if successful will relieve them of the duty of paying sickness benefit. And, in the field which they do not cover (and also for the litigants even in that field who through non-membership are not entitled to their assistance) there are no organisations of substantial size which assist working-men to obtain legal advice or assistance in the conduct of cases, except of

course the "poor man's lawyer" centres to be found in London and to a smaller extent in some of the larger provincial towns, where lawyers sit regularly (usually once a week) as "Poor Man's Lawyers" to give advice free to poor persons. Some of these are connected with settlements such as Toynbee Hall, some with local political organisations such as Conservative Associations and Labour Parties, some with religious organisations, and a few are wholly independent. There are approximately sixty such Poor Man's Lawyer centres in London, for a population of about 7,000,000 which includes a substantial proportion of working-class people. They do much excellent work, but apart from the defects necessarily associated with charitable work, and the distaste aroused by legal advice being given away (as if it were a pound of tea) as an advertisement for a political or religious association, they suffer from certain technical defects. Although a certain number of experienced solicitors give advice at some of such centres, the majority of the advisers are either students, young and inexperienced solicitors, or young barristers (who have neither experience nor training, but only learning). While the attempt to give this advice is good training for these gentlemen, the advice itself, although generally better than nothing at all, is not on a par with that of solicitors experienced in working-class litigation.

In the provinces, provision is in general worse than it is in London. One or two of the larger towns are actually better equipped than the Metropolis, but as against this many towns of substantial size have no machinery at all.

In considering the work at the Poor Man's Lawyer centres, it is well to compare this work with that of a solicitor in relation to his richer clients. The family solicitor is more than a legal adviser. He is a friend, a confidant, a general adviser to whom the middle-class client goes at nearly every important stage of his career. His clients consult him of course in his office. He has a properly trained staff to investigate evidence; he can write letters threatening proceedings and follow up those letters if necessary; he can take the opinion of counsel on a difficult point of law. Compare this to the case of a working-man seeking advice at a typical Poor Man's Lawyer centre. He hurries off from his work or his evening tea to the Centre, where, herded along with twenty or thirty other working-men and women, he is kept waiting for perhaps an hour, or two hours. At last his turn comes and he is shown into a room where, it may be, three gentlemen sit at different tables giving advice to other people. A fourth beckons to him. The adviser is a young man—often almost a boy, with of course no knowledge of the workman's life, outlook, and problems. Both have to speak up to make themselves heard above the voices of the other three and the crowd still waiting in the next room. It will very likely turn out that the workman has not brought all the necessary papers, and he must go away and go through the same process again next week. Advice is then given; he must write a letter to the landlord and bring in the answer. The following week he returns and sees another gentleman. The facts are explained again. The other gentleman is not sure about the legal position. He must look it up and see

the applicant next week. The following week it appears that proceedings are necessary. And that leads to further difficulties, for some of the Poor Man's Lawyer centres have no means of doing more than give advice; they can tell a man what his legal rights are, but they cannot help him to use any legal process to enforce them. Some on the other hand have a panel of solicitors who, if satisfied that the case is deserving of help and likely to be successful, will assist with legal proceedings. The client is shown a list of names and he chooses one, arranges an appointment, gets time off from work, and goes and sees the solicitor or, more usually, one of his clerks, at his office. The case is explained all over again and, if the solicitor is satisfied, undertaken. The working-man's case is not the most important in the office, and in a busy office there is a tendency for it to receive little or no attention from the solicitor personally, to be handled casually by his clerks, and to be shelved in favour of more important work. Some of the centres in London which have no such panel of solicitors send their cases to the Bentham Committee for Poor Litigants, another voluntary organisation, which keeps a panel of solicitors and counsel, and has an office and a full-time secretary. Its procedure is of necessity a little cumbersome, and tends to sift out a number of cases. A case which is fought by the aid of the Committee is first considered by the Poor Man's Lawyer centre, then by the secretary of the Bentham Committee, and finally by the conducting solicitor and counsel. And besides the legal aspects of the matter, the means of the poor person are investigated and considered, in

order to make sure that no one who can afford to pay is given assistance free. This is not in itself unreasonable, for lawyers must live, and those who can pay should not under present circumstances obtain help free; but the whole sorry story is all part of the miserable pattern of modern life. The rich or moderately well-to-do, when they need legal assistance, buy it in the open market and obtain it, as it were, promptly delivered and properly wrapped up, like their groceries. The poor, who can far less afford to sacrifice or forgo their rights, have to run from pillar to post, accepting this and that bit of hurried and half-efficient advice, doled out in charity, after being subjected not only to a means test but also to a full investigation of their case to see if it is good enough to spend charity on.

A little further ground is covered by some of the hospitals, who have of necessity seen a good deal of the activities of "ambulance-chasers", and have recognised the great importance to patients of having their claims properly handled; these hospitals have established a panel of solicitors who are prepared to undertake a certain volume of work upon a speculative basis (see below) but nevertheless with an honest regard to the client's interests.

It might be thought that, as a good many accident cases involve claims far above the ordinary County Court limit of £100, many such cases would be conducted in the High Court under the Poor Persons' Procedure; but in practice only a negligible number of such cases (97 in 1934) actually receive certificates under that Procedure.

It is clear that, when all the above means of helping

poor men's litigation have covered what ground they can, there remains a large number of workmen unprovided for. Some no doubt obtain financial help from relatives and friends, or raise money from loan clubs, and pay a solicitor. Some find a charitably disposed solicitor who will make a special exception and take up the case without demanding his fee in advance. And the rest of those who fight, quite a large class, seek the assistance of a "Speculative Solicitor". A speculative solicitor is one whose practice consists, wholly or substantially, in carrying on litigation upon a speculative basis, standing to lose his costs if he fails either to settle or to win the case. His losses where he does lose are not so great as those of an ordinary solicitor who loses a case, and fails to recover his bill from his client, since the speculator usually works with speculative counsel and speculative doctors.

Speculation of this kind is not regarded by lawyers as good professional conduct, and lawyers who practise it are generally suspected of touting for clients, of conducting their cases unfairly vis-à-vis their opponents, and also of conducting them badly or dishonestly. Moreover, some of the less desirable of the speculative solicitors are linked up with so-called "legal aid societies" which make the seemingly attractive offer to attend to the poor man's litigation without charge, on a promise of 10% of the proceeds in the event of success. Having collected the client by "ambulance-chasing" and other ingenious methods of canvassing, they pass him on to the speculative solicitors, who may be in an adjoining building. The latter do not tell the client that in the event of failure

he will be personally liable for costs; they carry on the case for him, and if he wins they collect their costs from the other side and the client pays in addition 10% to the ambulance-chasers who have done nothing whatever to merit it. (Their claim to the 10% is unenforceable in law, but the workman does not know this, and in any case it is taken from him when the solicitors pay the money over to him.)

The accusation of touting in itself is not of as great importance as is the question of unfair conduct, which is said to provoke (or is used to excuse) a certain lack of professional honesty on the part of certain insurance companies and the solicitors who represent them in dealing with speculative solicitors. It may be a question as to who began the foul play first. Certainly questionable pieces of work on the part of these insurance companies and their solicitors are, as already explained,[1] extremely common. The question of dishonesty on the part of speculative solicitors towards their own clients is clearly of first-rate importance. So far as direct dishonesty, such as misappropriation of funds (usually in the form of reporting that a much smaller sum has been recovered than is the fact) is concerned, it is not easy to ascertain the proportion of these cases which occur among speculative solicitors. But there may be dishonesty of a kind not so direct. They sometimes incur costs unnecessarily in order to recover them from the insurance companies, and sometimes betray their clients' interests by accepting more in costs than is justified upon condition that less is paid to their client than the case is worth. Sometimes,

[1] See p. 136.

too, they use clients' cases as bargaining counters (i.e., they settle one case for less than it is worth in order to get a settlement and costs in another case which is worth nothing at all); and sometimes they issue proceedings in hopeless cases recklessly, in order to exploit "nuisance value"[1] by compelling the insurance companies to pay up something rather than face the expense of defending.

Perhaps the major evil of the speculative solicitor is one that is less obvious and spectacular than the question of dishonesty. It is that, when a case which he has undertaken proves to be difficult or doubtful, or particularly troublesome to prepare, so that the prospects of making money out of it are small, he is apt simply to ignore it. A suspiciously high proportion of cases that are brought to Poor Man's Lawyer centres and similar bodies prove to have been first to a speculative solicitor and to have been "hung up" by him for a long time; on investigation they prove to be difficult, but by no means hopeless, and they are not infrequently carried on and won.

The speculative solicitor (at any rate the speculative solicitor who runs his whole business on the speculative basis) is at his best an enemy of his profession and a not too efficient servant of his client; at his worst, he is a grave social evil. And yet the provision of machinery for the conduct of poor men's cases is so meagre that it is impossible to contemplate his immediate extinction, even if that could be achieved. For the moment, he fills a real need, and no steps should be taken to eliminate him, as opposed to merely controlling

[1] See p. 81.

abuses, until some efficient machinery is created to take his place. But why the working classes should be expected to put up with such bad service, one doesn't know—or rather one does know only too well.

There is a fairly numerous class of solicitors who might be called "semi-speculative", without any derogatory meaning of the phrase. They are solicitors who, without looking to speculative cases for their living, are from time to time prepared to grant poor clients very long credits or to undertake their cases upon payment down of sufficient barely to cover out-of-pocket expenses. They of course fill a very real want, which ought to be filled by the State.

The litigation mainly covered by the machinery so far considered is that arising out of accidents. This, whilst of a very large total volume, does not by a long way cover the whole field of working-class litigation. Another very wide group of cases arises out of employment disputes; questions of the amount of payment due, wrongful dismissal, term of notice, and the like, often arise; they are vital to the workman, but of much less importance to the employer unless it is essential to fight the men "to put them in their place", or unless the same point is involved in a large number of cases, so that the total sum is substantial. In the well-organised trades, such disputes are dealt with largely by the Trade Union; block agreements are frequently drawn up between the union on the one hand and the employers' organisation on the other, providing for arbitration upon complaints of bad workmanship, misconduct, insubordination and so on. Upon the

hearings before the arbitrators the workmen are usually represented by Trade Union officials. These officials, with no legal training and very often with very little time in which to prepare their cases, nevertheless attain a considerable degree of efficiency by experience. Outside the organised trades, or where there is no machinery for dealing with these disputes, the employers have it very much their own way. And having it their own way means that some employers, knowing their strength and the men's weakness, will do many things which they could not maintain if effective challenge were possible. A very large proportion of the workers in this country are employed upon a weekly basis, and the employer can in law dismiss any such servant, without assigning any reason whatever, at the end of the week either by giving one week's notice or by paying one week's wages in lieu of notice. If, therefore, any dispute arises as to the terms of the employment, the hours, the quality of the work or the conduct of the servant, the employer can avoid the issue by simply dismissing the servant. This of course works very real injustice, but "freedom of contract" enables the workman to agree to such terms of service, just as freedom of personal movement enables him to be eaten by a lion if he finds himself defenceless in the real, natural jungle. But it not infrequently happens that an employer, either in anger or to enforce his authority, will dismiss a servant without either a week's notice or wages in lieu of notice, alleging that this course is justified by some serious misconduct on the part of the servant. The servant then has the right to bring an action in the County

Court for his wages in lieu of notice. The amount involved is necessarily small, and there is nothing in cases of this type to attract the speculative solicitor. Unless, therefore, some point of principle is involved (in which case a number of workers may join together to pay a solicitor a special fee) or unless he happens to belong to a Trade Union which will attend to this type of case, the workman if he considers the time and trouble and anxiety of the case worth while must conduct the case as best as he can himself, or with the aid of some charitable organisation.

Apart from his work, the poor man's main concern in life is his home. He is almost invariably a weekly tenant. Apart, therefore, from the Rent Restriction Acts no large class of very difficult questions falls to be decided at law. If the worker is not satisfied and he can find alternative accommodation, often a very difficult task, he can give a week's notice and quit. If the landlord is not satisfied, he can give a week's notice and unless the Rent Restriction Acts affect the property, whether the tenant can find anywhere else to go or not, he is under an obligation to quit and if he does not the landlord can apply to the County Court and as of right obtain an order for the court to turn out the tenant and for the tenant to pay the costs. Moreover, apart again from the Rent Restriction Acts, the landlord has very powerful rights to distrain for rent in arrears (i.e., to walk in, take some of the tenant's furniture, and sell up so much of it as will provide the rent and the costs of the distress). Provided the rules are complied with, there is no arguing about the distress and nothing for a lawyer to do except to

advise the tenant to beg or borrow sufficient money to pay the landlord.

So much for the position apart from the Rent Restriction Acts, a position under which the landlord has things very much his own way, especially where there is a shortage of working-class accommodation. The Rent Restriction Acts do to some extent mitigate the hardships of this situation for the tenant. They provide, roughly, that rents of certain working-class tenements and houses shall not be increased by more than a certain amount over the rents which they commanded on the 3rd August, 1914—and that so long as the tenant behaves himself and pays the rent as so increased the landlord shall not be entitled to turn him out. The Acts contain a number of highly complicated rules which define the premises to which they do and do not apply, provide for some premises to become free from the restrictions, and purport to clear up a hundred and one other points. Unfortunately they are so worded as to give rise to some extremely difficult legal problems. Apart from the difficulties of these problems it is frequently almost impossible for the tenants to ascertain and prove the relevant facts. Many changes may have taken place since 1914.

There are probably few branches of life in which modern legislation has been so badly drafted, or in which the number and complication of the legal questions raised have been so remarkable. And there have probably been no branches where such ingenuity has been employed by landlords' legal advisers to get rid of tenants. It is a typical bit of capitalist tragedy. To begin with, of course, the working classes for many

decades were kept permanently short of housing accommodation because the bright bosses who control all our lives had squeezed their wages so low that they could not pay enough in rent to make it worth while to build them houses. The builders either sat idle and dismissed their men (who also lived in houses and paid or owed rent) or else built luxury houses (or flats) and public-houses. The governing class bore this unnecessary inconvenience and suffering of the working class with their usual patience and courage, until the movement of population and the cessation of building during the war made the problem so acute that, had capitalism been left to work the rents up to the level set by supply and demand, the working class would have revolted—and war-time was particularly inopportune for revolt. Accordingly, something had to be done, and as the modern technique of greasing the wheels of capitalism by greasing the palms of individual capitalists with subsidies had not yet been properly developed, there was nothing left for it but to impose upon landlords of working-class property the quite genuine injustice (from a property point of view) of telling them by Act of Parliament that they—and they alone of all their moneyed fellows—were not to join freely in the great game of profiteering. Mr. Philip Guedalla said of war-profiteering, "No price is too high, when honour and freedom are at stake"; but Parliament added the rider, "save in respect of rents". What was the next thing that the inexorable workings of capitalist economy did? In the course of nearly a quarter of a century since the first of these Acts was passed, much land, the site-value of which was

previously low enough to allow the working class to continue to inhabit it, increased considerably in value, and landlords found themselves in positions of great temptation. A house which might command a rent of £1 per week if it were not affected by the Acts would be limited to a rent of, say, 14*s*. That in itself, if multiplied by a few hundreds, might make a landlord weep, but what if the site itself has meanwhile reached a value of £3,000 or £4,000? Or if, whilst not of itself very valuable, it obstructs a big development? Many are the stories of the schemes practised to overcome difficulties of this kind. Some have become enshrined in Law Reports, and some have not. Perhaps one of the most ingenious was employed to empty a whole row of "controlled" working-class houses in a London borough. The site was badly wanted for the erection of luxury flats, "wanted" not because the needs of the middle class were more urgent, or the shortage of flats for them as great as the shortage of dwellings for workers, but because their "wants" show a profit to the supplier. How were the workers to be got out? It chanced that one tenant died, and his family had all dispersed, so that one house was vacant. The kind landlords promptly papered and painted it, and offered it to one of the other tenants; they told him that they might want the house he then occupied, and anyway the other one was clean and newly done up, and "just the same in every way", and they offered to meet the cost of his moving. He accepted and moved. They then papered and painted the house he had left, and told substantially the same story, with suitable variations, to another tenant. In the course of a few months, at

the cost of a little paint and paper, and some removal expenses, they had apparently done nothing but change all the tenants round. Then, suddenly, they gave all the tenants notice to quit. The tenants, confident in the Rent Restriction Acts, ignored them. But proceedings in the County Court followed and the trick was discovered. What the landlords had not told the tenants was that the houses in question fell into the class of house which remains restricted unless and until the landlord resumes possession, but on such resumption becomes free of restrictions; here, the landlords had resumed possession in each case for a few days, and so each tenant, as he moved into another house in the same row, passed unwittingly from the protection of the Acts into all the blessings of freedom of contract.

The position as to legal aid for poor men in relation to questions of this sort is extremely unsatisfactory. The cases cannot be brought in the High Court, so that there is no official machinery. The speculative solicitor is not interested, for he can make little out of such cases, even if he could find means of getting in touch with the prospective litigant. The cases have to be fought in the County Court, and are extremely difficult to conduct. The Trade Union or the Approved Society, again, cannot help. The workman has accordingly either to conduct the case himself or get the aid of a "P.M.L." or other charitable organisation; and the landlord knowing this will of course be all the stronger in his demands in any negotiation.

The Poor Man's Lawyer centres, for various reasons, are able to do much better work in connexion with landlord and tenant problems than in Workmen's

Compensation cases and Street Accident cases, where the speculative solicitor, by the greater experience gained through the volume of his work, and the advantages of being less scrupulous and more able to make semi-dishonest bargains with semi-dishonest insurance companies is, in general, a more formidable fighter than the best of "P.M.L." solicitors.

Matters involving sex relations are dealt with mainly either in the police courts or in the Divorce Court. Police Court matters, if lawyers are employed at all, usually involve costs of about four guineas on each side. Divorce Court matters, if uncontested, cost £50 or more, and, if contested, from £100 upwards on each side. The matters within the Police Court jurisdiction comprise separation and maintenance cases between husband and wife and applications for affiliation (i.e., bastardy) orders. These cases are fairly efficiently handled by the local solicitors who undertake advocacy, and on account of the comparatively low fees involved they are frequently employed on one side or the other. There do occur, however, a large number of cases where one of the parties—for example a wife who has been left without means by her husband—cannot afford even the moderate fees involved, and in such cases the opposing party has a substantial advantage. There is no means of providing the impecunious with help in such cases, apart from charity.

Breach of Promise and Seduction cases are not common, especially among the poor, but when they are brought they are brought in the High Court and the Poor Persons' Rules consequently apply.

Divorce is one of the major legal problems for the

poor, for the costs are out of all proportion to a working-man's wage; the cases are of the utmost importance, involving, as they sometimes do, a lifetime's happiness, and as the law now stands the cases must be tried in the Probate, Divorce and Admiralty Division of the High Court or at Assizes. That problem is to some extent alleviated by the Poor Persons' Procedure, mentioned above, at pp. 158–60.

This system, whilst applying to all High Court work, is mainly occupied by divorce cases. It is based on large-scale charity; those who admire charity will like it; those who dislike charity (including, of course, a very large proportion of the working class) will dislike it. The underlying idea is that, the poor being unable to afford to pay for legal services in the High Court, and needing that service, must have it, and the barristers and solicitors must give their services free, so that there may be "no injustice to the poor". Employed and paid by one-tenth of the population, the lawyers, or rather a small proportion of them, thus give some free service to nine-tenths of the population! This system works more effectively in relation to divorce than in relation to any other matter. The number of "poor persons proceedings" instituted in 1934 was 2,134. Poor persons were unsuccessful in 94 of these and successful in 1,848, of which 5 were in the Court of Appeal, 33 in the Chancery Division, 97 in the King's Bench Division, 3 in the Probate Court, and the remaining 1,710 in the Divorce Court. This proportion of successes is in itself suspicious. It shows that the cases dealt with under the rules have been very carefully sorted out, and nearly all the

doubtful ones eliminated. A speculative solicitor who had half as good a proportion of successes would do very well. A rich man has the luxury of having even a doubtful case tried by a court; a poor man has his case investigated to begin with by a committee of solicitors who decide whether it is a fit one, and only after they have approved it is it allowed to proceed to court. In 1934, 1,971 applications for Certificates to enable people to proceed as Poor Persons were refused. The grounds for refusal are not given.

A rich person seeking legal advice relating to matrimonial affairs consults the family solicitor, or some other solicitor recommended by someone who knows him well. The matter is talked over quietly and privately. All the circumstances are carefully considered, to see whether it is best to aim at a reconciliation, a divorce, or a simple separation. If the latter course is decided upon the details are discussed and arranged between the solicitors to the respective parties, a deed is drawn up, the parties separate, and all unnecessary publicity is avoided. If it is decided to apply for divorce, the guilty party is very often advised to give evidence of his or her adultery to the other party in order to minimise the unpleasantness and difficulty of the proceedings, and both parties are advised how to co-operate whilst avoiding the pitfall of "collusion". If the more guilty party fails to give the necessary evidence, the solicitors to the less guilty or innocent party cause enquiries to be made, enquiries sometimes extending over many weeks and costing, perhaps, £100 or more, until they are satisfied that there is sufficient proof. Proceedings are

in due course instituted, questions as to the custody of the children, the maintenance of the wife, and so on are either discussed and agreed, or dealt with before the court officials, and the matter proceeds as smoothly as the somewhat unpleasant law on the subject allows.

For a poor person the case is different. Unless he gets advice from a Poor Man's Lawyer centre or consults and pays a solicitor for the preliminary work, he has to make up his mind without legal assistance as to what steps he should take, avoid collusion by the light of nature, obtain the necessary evidence as best he can, fill in a form about his case and his means (to show that he is poor enough to need this charity) swear a declaration as to the truth of his statements, and take an appointment to appear before the appropriate committee of solicitors for his district. At times there is such a heavy waiting list that, except for urgent cases, applicants may have to wait as long as three months for an appointment. Why should a poor person wait three months before his application is even considered—and all this time in suspense, without even a legal opinion as to the strength of the case?

The Poor Persons' Rules provide that no certificate may be granted to an applicant unless he can show that he is not worth a sum exceeding £50 (excluding wearing apparel, tools of trade and the subject-matter of the intended proceedings) or in special circumstances £100, and that his usual income from all sources does not exceed £2 a week, and in special circumstances £4 a week. It is not easy to define the precise limits of the expression "special circumstances", but the present-day high cost of living is usually treated as

constituting special circumstances within the meaning of the rules, especially where there are dependants. In matrimonial causes, where the wife is the applicant, she must show that neither she nor her husband are worth, and that their joint income does not exceed, the amounts above specified, or that it is reasonable in the circumstances that she shall be admitted to take, defend or be a party to the proceedings as a poor person; and the certificate may be limited to such proceedings as are necessary to enable her to obtain an order for her husband to pay into court a sum of money to meet her costs. To judge by one of the annual reports, some at least of the committees decide on this question of means in a manner closely reminiscent of the Means Test. Those who come before the Committee of the Hull Incorporated Law Society, for example, should beware, for that Committee in its report "feels very strongly indeed" that where an applicant's relatives are in a position to contribute towards the costs, the Rules should allow for some portion of the costs to be obtained from them. In another district, applicants are reported to be "closely questioned as to means" before the case is even placed before the Committee.

The question of means is not the only question to be considered by the Committee (of solicitors), for that Committee must also be satisfied that the applicant has reasonable grounds for taking or defending or being a party to proceedings in the High Court.

As an overwhelming preponderance of cases brought under the Procedure are successful, and a large number of applications are rejected by the Committees,

the inference is strong that they investigate the cases brought before them with thoroughness and even strictness. The poor person would appear, therefore, to have the trouble of establishing that he has a strong *prima facie* case, and to establish this it may be necessary to conduct extensive enquiries. The secretary of the Committee in London has been able to retain the assistance either free or at greatly reduced rates of enquiry agents for poor persons, but it is believed that for applicants outside London there exist no means of assisting them with their enquiries. The number of applicants who fail for lack of proper evidence is not known, but it must be great. There are probably many who, not being able to obtain the evidence, never even apply.

But if this difficulty can be overcome, there is another difficulty which the poor person has to face. To judge by one of the annual reports, some of the Committees have taken it upon themselves to exercise a kind of preliminary moral censorship over applicants in matrimonial causes. One provincial Committee refers to cases where "the parties have obviously regarded a marriage so lightly" that it has "felt reluctant to put the court and the conducting solicitor to so much trouble in bringing about its dissolution". The Committee of the Liverpool Law Society admits that it does not "encourage" applications by persons who have themselves committed or are living in adultery, and refers to cases in which they have granted certificates where there were "extenuating circumstances". Either it must be admitted that the Poor Persons' Rules provide for a system of charity

to be doled out only to selected, worthy and grateful objects or the system must be so operated as to give poor persons something not too unlike the professional aid available to those who pay for it. If that is to be done, the Committees should be made to understand that it is for the Court, and not for any Committee of Solicitors, to decide whether "extenuating circumstances" exist; a petitioner, even a poor person, who has committed adultery should be entitled as of right to petition the court to grant a decree in its discretion, without the interposition of any Committee as a self-constituted judge of an applicant's morality, and so of his right to resort to the courts of his country.

When the certificate has been granted the poor person is usually ordered to deposit a sum of £3 to £5 to cover witnesses' fees and other out-of-pocket expenses. In a large number of cases applicants have difficulty in finding even this small sum. The deposit paid, the poor person's case is assigned to a solicitor and counsel. If they decide that there is not a strong *prima facie* case, or that the poor person really has means, it is their duty to report the matter back to the Committee with a view to having the certificate annulled. How well the cases are conducted by the solicitors and counsel who undertake them is a matter that varies greatly. Some lawyers regard it as a point of honour to treat poor persons in exactly the same way as they would treat any ordinary client. Others appear to leave the cases entirely to overworked clerks.

In divorce, of course, as in other fields of litigation, there is great hardship on those people who are just not poor enough to be able to use the Poor Persons'

Procedure—e.g., a tram conductor earning £4 2*s.* 6*d.* per week would be ineligible, and so would a man earning £3 per week unless he happened to have very heavy burdens in the way of dependants. This intermediate section of the community, roughly every one earning between £160 per annum and £600 per annum, are caught in a gap between the poor and the rich. Too rich to be helped, and at the same time much too poor to be able to spend any appreciable amount on lawyers, they must, if they wish to obtain a divorce, either save up, or find a solicitor to undertake the case upon the instalment principle (since a divorce takes at least nine months from start to finish, there is time for a substantial sum to be paid before decree absolute, if even fairly small weekly instalments are paid) or, a difficult task, conduct the case in person. Where no poor person's certificate is granted, the full court fees and counsel's fees are payable, so that even if the solicitor reduces his charges out of kindness the petitioner will have to pay something like £40 to cover the court fees and counsel's fees, as well as the witnesses' expenses.

Another class of case in which the poor are largely interested arises out of small debts and hire-purchase agreements. The working classes are persuaded to buy a great many things, such as clothes, furniture, musical instruments, wireless sets, motor bicycles, and so on upon terms under which payment is made by instalments, and usually not until all the instalments are paid do the goods become the property of the purchasers. While the instalments are being paid, however, the goods are handed over to the purchaser, who treats

them as his own. He is of course compelled before he takes the goods to sign an agreement, usually a hire-purchase agreement, which has been carefully drawn on behalf of the vendors. He does not usually read the agreement, and if he does he will not understand it.

Trouble usually arises out of one of two causes. Either through poverty or for some other reason the purchaser gets behind with his instalments, or the article purchased does not come up to expectations and naturally the purchaser is unwilling to pay a further instalment until it is put right. In either of these cases, under the usual form of agreement, the traders are entitled to take back the article, and very often to sue the purchaser for the instalments still to be paid in respect of the hire of it. Thus the unfortunate purchaser is under an obligation to pay for something which he no longer has and which, in the event of it having gone wrong (as for example a wireless set) he has returned for what appears to him to be a very good reason.

It is in this case that the purchaser is in need of legal advice. He needs to be told exactly what his rights and liabilities are so that if he really has no defence he may go to the trader and come to terms. It is often fairly easy to come to terms with the trader, since the court proceedings which have to be taken to enforce these agreements are lengthy, and their actual cost is much higher than the court scales permit them to recover from the defendant, even if he is able to pay; and although by continually harassing the purchaser it is in about 80% of the cases possible ultimately to recover some or all of the money, the

cases are from the traders' point of view a great deal of trouble, and are usually undertaken mainly as a deterrent to other hire-purchasers.

It is in matters of this kind that the Poor Man's Lawyer centres are particularly helpful, but there are many working people who do not appear to know of a Poor Man's Lawyer centre and many places where no such centre exists, and where no help is forthcoming the purchaser generally has a County Court judgment against him, and is then harried with judgment summonses.[1]

The Government and the courts are not of course unaware of the abuses of this class of trade, and one illustration of the struggle between the more unscrupulous of the hire-purchase firms and the authorities will be illuminating. Frequently in the last few years it has been observed that poor persons who were alleged to owe money on hire-purchase agreements were being sued in the courts of the district where the firms had their head office, far distant from the defendants' homes, where they could not possibly afford to attend. The County Courts, being originally established as the courts for poor men's litigation, have very strict rules to prevent men being sued outside the district where they live if they fall into certain classes of workmen likely to be unable to meet the expense of litigating at a distance; but it was found that this provision was being circumvented by the swearing of affidavits, unjustified by the facts, that the men in question were in a superior and well-paid position. To put an end to the evasion, the County

[1] See pp. 109 ff.

Court rules were altered to make it impossible in general to sue in the distant court, but there is no end to ingenuity, and the more unscrupulous firms immediately proceeded to arrange to have offices in the City of London, where the court corresponding to County Courts in general is technically not a County Court and has different rules.

Another illustration of how some companies will take advantage of the helplessness of most of their customers is rather amusing. A poor man in a Northern town received a demand for certain payments after the goods had been retaken for arrears. He wrote to a barrister he knew, enclosing the letter, and asking what he could do, saying he did not mind taking the goods and paying for them, but did not want to pay for them and not have them. He did not enclose the hire-purchase agreement—very likely he had not got it—and the barrister wrote back:

"I cannot help you unless I have a copy of the agreement. The company's rights depend on that, and it may well be that they are justified in what they did. Send me a copy of the agreement, and then I can help you."

The answer he received was:

"I sent your letter straight on to the company, and they returned the goods the same day."

In how many thousands of cases in which a defenceless purchaser gets judgment given against him, one is led to wonder, would the company draw in its horns if the purchaser could merely say: "I have a friend who is a lawyer, and he might help me."

The more important classes of litigation in which poor persons are involved have now been covered,

so far as civil litigation is concerned, but there are in addition a number of very varied matters in connection with which legal advice or assistance is sometimes required. National Health claims are usually dealt with without legal assistance, although sometimes points of law, and exceedingly intricate points of law at that, need to be considered.

Pensions, whether Old-age Pensions or War Pensions, give rise to a number of questions both of fact and of law which need to be cleared up, and there is a special procedure with a special lay tribunal for deciding these questions. It is very unusual for applicants to be legally represented before this tribunal and much more work is done by charitable organisations than by lawyers.

There is in the aggregate an enormous business in small industrial insurance policies, and questions frequently arise between the persons insured under those policies and the insurance companies. There are elaborate statutory provisions designed to prevent the insurance companies from swindling the insured, as, for example, where after payments have been made for many years the policies are allowed to lapse. At one time the insurance companies which undertook industrial insurance reaped a rich harvest from this source alone. Now it is obligatory upon them to give to the insured, in the form of a paid-up policy, the benefit of the payments made. Advice as to the insured's rights can be obtained at Poor Man's Lawyer centres, where they exist, but far too often it occurs that the rights are not asserted through ignorance. The whole tangled story of the baser of these companies and their agents introducing new tricks, followed by legislation

to prevent them, followed in its turn by another set of tricks, is an extremely illuminating chapter in our great capitalist history, and is paralleled perhaps only by the way the same game of battledore and shuttlecock has been played between the revenue legislation and the respectable lawyers and accountants who assist the wealthy in the activity which they call tax-avoidance and others call tax-evasion; but that is outside the scope of this work.

In the House of Lords and Privy Council, the only official provision for poor persons is the old *in forma pauperis* proceeding, which was superseded in the High Court by the Poor Persons' Procedure. This proceeding requires an extremely high standard of poverty (but one nevertheless not infrequently achieved by litigants who get as far as the final courts of appeal). They must not be worth £25 in the world, apart from their wearing-apparel and the subject-matter of the litigation, they must have the opinion of counsel that they have a reasonable prospect of success, and they must have the leave of the court so to proceed. They must then, notwithstanding their utter poverty, somehow meet the cost of the necessary printing of documents, which in those two tribunals is heavy, although recent arrangements have diminished it substantially. Notwithstanding these difficulties, the procedure is pretty frequently invoked. It of course leaves, even more than the Poor Persons' Procedure[1], a very large part of the population unable to carry their cases to those courts because they are neither poor enough to proceed *in forma pauperis* nor rich enough to pay their way.

[1] See pp. 177–183.

CHAPTER VIII

DEFENCE OF POOR PERSONS ON CRIMINAL CHARGES

IN THE LAST chapter an attempt was made to explain the tangled and unsatisfactory machinery that exists to provide after a fashion legal aid for the poor in various forms of civil litigation. But poor men are often involved in criminal proceedings. Indeed, there is a prevailing idea that criminal proceedings are primarily designed for the poor, and that it is "not quite nice" for the criminal law to attempt to fasten on "gentlemen"; the indignation felt by the general population of Wormwood Scrubbs prison—it is notorious that most convicts are good Tories—when they learnt that the late Lord Kylsant had not merely to suffer the humiliation of living among them, but was actually to be treated as one of themselves, is said to have been genuine, deep-seated, and most moving.

Up to a few years ago, there was broadly speaking a touching equality before the law for all persons accused of crime, irrespective of their wealth; for if they required the assistance of solicitors and counsel to defend them, they could pay for it in the ordinary way. The only exception was that a prisoner appearing for trial at Assizes or Quarter Sessions could, on producing the sum of £1 3*s*. 6*d*. in cash, select any counsel in court to defend him without the intervention of a solicitor, and that if he had not the necessary

£1 3*s.* 6*d.* the judge could, if he would, ask some counsel who was in court to defend him free, in the same way. It is no doubt from the efforts of well-meaning and inexperienced young gentlemen hired at short notice in this fashion that so many of the old stories have arisen; for example, that of the once-again convicted felon who replied to the usual question, whether he had anything to say before sentence was passed upon him, "Nothing but to plead the youth and inexperience of my counsel", or that of the Recorder who said that Mr. —— "had in a few halting sentences convinced the jury of his client's guilt". But in truth the ablest counsel in England could not have made much of a job of any but the simplest possible case under such circumstances. The case would be coming on for hearing, generally speaking, within a few hours; there would be no time to ascertain what witnesses might be needed, still less to send for them; there would be little time even to reduce the prisoner's own story to coherent form, or to look up any law that might be involved. But it was regarded as good enough for the poor, who were probably guilty anyway, so the public looked on with indifference whilst men who were not infrequently morally as well as legally innocent were found guilty and sent to prison to be made into criminals at the public expense in order to emerge and cause more expense by actually committing crimes.

In actual practice, the result of the naked simplicity of the system was that most prisoners were altogether undefended, and that those who were defended often had this advantage only because all their friends and

relatives from far and near subscribed what they could or could not afford, to build up a fund.

Of recent years, the simplicity of this iniquity has been invaded by a certain amount of legislation, which deals with the provision of legal assistance under three heads, viz: cases tried on indictment[1]; cases tried summarily in the police courts[2]; and cases proceeding before magistrates prior to committal,[3] and appeals.[4] The first attempt to provide for defences in trials on indictment by legislation was in the Poor Prisoners' Defence Act, 1903, where the beginnings were made of a systematic provision of legal aid by the State for such prisoners. The Act laid down that in cases where, having regard to the nature of the defence set up by any poor prisoner, as disclosed in the evidence given or statement made by him before the examining justices, it appeared that it was desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defence, and that his means were insufficient to enable him to obtain such aid, the justices upon committal or the judge before whom he was to be tried might certify that he ought to have legal aid, and thereafter he should be entitled to have solicitor and counsel assigned to him, their expenses to be paid out of local funds.

It will be seen that three conditions had to be fulfilled before a prisoner could receive legal aid. In the first place he had to show insufficiency of means; secondly, the court to whom the application was made

[1] See pp. 112 *et seq.*
[2] See p. 111.
[3] See p. 112.
[4] See pp. 130.

had to be satisfied that it was desirable in the interests of justice that the prisoner be represented; and, thirdly, the prisoner must have given evidence or made a statement before the justices and thereby disclosed a defence. It was this third provision that stamped the Act as the product either of ignorance or of hypocrisy, and helped to ensure that it would never have widespread application. For it was and is the almost universal practice of defendants likely to be committed for trial to "reserve their defence" before the examining magistrates. By so doing, they preserve the element of surprise, and prevent the prosecution from spending the days or weeks intervening between committal and trial in picking the defence to pieces. If the defence is fraudulent, it will not stand such a test; if it is honest, the temptation to the prosecution to weaken or counter it by unscrupulous means would not always be resisted. There is something to be said for so changing the criminal procedure of the country as to provide the prosecution with a better opportunity of testing the genuineness of a defence, but there was nothing whatever to be said for providing that opportunity only when and because prisoners were poor, or for blackmailing or bribing them into putting their case at a disadvantage compared to other men's cases as the price of supplying them with legal aid, which should be every man's right.

The Act of 1903 was the only provision on the Statute Book (where perhaps its main function was to lull the middle classes into the belief that poor people were properly defended before juries) until the initiative of a private member of Parliament

secured the passage of the Poor Prisoners' Defence Act, 1930, which is now the basis of the system under which State aid is granted in criminal cases.

This Act makes provision in the first place for the grant of legal aid to persons committed for trial for an indictable offence and the assignment to them of solicitor and counsel on a certificate, called in the Act a "defence certificate", being granted. As under the 1903 Act, before a certificate can be granted it must be proved to the satisfaction of the examining justices or the judge to whom the application is made that the prisoner's means are insufficient to enable him to obtain legal aid. *Once this condition has been fulfilled*, however, the 1930 Act makes two important changes. In the first place, on a charge of murder, nothing further need be shown by the prisoner, and legal aid must be granted. Secondly, in other cases, a prisoner may be granted legal aid if it appears to the examining justices or the judge that it is desirable in the interests of justice, having regard to all the circumstances of the case, including the nature of the defence, *if any*, set up before the committing justices, that he should have legal aid. By thus making the test the desirability in the interests of justice that the prisoner should be represented, the 1930 Act permits the grant of legal aid even in cases where no evidence has been given before the examining justices nor any defence disclosed. Legal aid may in fact be and sometimes is granted even in cases of clear guilt, where it appears desirable that the prisoner should have counsel to plead for him in mitigation of sentence.

The costs of the defence under a defence certificate

are paid out of the funds of the local authority responsible for the prosecution. The Act also extends to those cases where, without a defence certificate being granted, the judge has exercised his power, already mentioned, of requesting counsel to undertake the prisoner's defence. Prior to the coming into force of the 1930 Act the services of such counsel had to be given free, but under Section 3 (3) of the Act the court can direct that fees shall be paid out of local funds to counsel so acting.

Rules for carrying out the Act, and in particular regulating the manner in which solicitor and counsel are to be assigned to prisoners, have been made under the Act. Under these rules every Clerk of Assize and Clerk of the Peace has to keep lists of solicitors and counsel attending the circuit or sessions, who are willing to act for poor prisoners, and these lists are sent to every Clerk to Justices on the circuit or in the county Any justices, judge or chairman of Quarter Sessions who grants a defence certificate must at the same time, after taking into consideration any representation which the prisoner may make, assign to him from the list a solicitor whose services the prisoner is entitled to. Any member of the Bar whose name appears on the list may be instructed by the solicitor so assigned. As a matter of practice, however, where an application is made for legal aid to the court of trial it is generally the custom to allot counsel only, unless the circumstances are such that the assignment of a solicitor is absolutely necessary. Under the rules power is given to the Court to certify for two counsel, and occasionally, but not nearly often enough, leading counsel is employed.

Such is the legal framework of the existing system providing for the grant of legal aid to those committed for trial. It is clear that the system is one giving considerable room for variation in practice, since views of what constitutes desirability in the interests of justice are capable of wide variation as between different benches of magistrates or judges. That this variation in fact exists is well known to any person with even a limited acquaintance with criminal justice as administered at Assizes and Quarter Sessions. Many benches of magistrates, and indeed some judges, appear to grant legal aid on the same principle as under the old 1903 Act, namely that legal aid should not be granted save where a defence has been disclosed upon the depositions; a few would appear to hold that any person committed for trial for an indictable offence is entitled to legal aid if he wants it. With so wide a discretion vested in those to whom applications for legal aid must be made, the system will clearly work well or ill according to the point of view of those called on to administer it. To make any real estimate of the value of the system in practice calls for an examination of a good many facts which are not too easy to collect. Few persons have experience of more than a small proportion of even the Assize courts of this country, while the opportunities for studying the practice of the various benches of magistrates are even more limited. Under the rules, however, particulars of the cases in which applications are made for defence certificates must be furnished by Clerks of Assize and of the Peace and Justices' Clerks to the Home Secretary, and from these statistics a rough picture

of the practical working of the system as a whole can be obtained.

Particulars are only available of defence certificates granted since the 1930 Act came into force, and the last year for which figures are at present to be had is 1934. The figures are as follows:—

(1) GRANTED BY Examining Justices on Committal for Trial at Assizes or Quarter Sessions.

		Applied for by Prisoners		Offered by Court without Application	
		Granted	*Refused*	*Accepted*	*Declined*
Murder	1931	33	-	18	1
Other offences	1931	547	132	92	7
Murder	1932	34	-	16	1
Other offences	1932	730	289	87	9
Murder	1933	34	—	17	1
Other offences	1933	792	242	97	2
Murder	1934	42	—	24	—
Other offences	1934	918	306	97	4

(2) GRANTED BY Quarter Sessions:

1931	271	223	21	—
1932	386	345	14	2
1933	361	279	24	—
1934	377	274	22	3

No. of Defences undertaken at request of the court under Section 3 (3) of the Act:

1931	55
1932	41
1933	57
1934	45

(3) GRANTED BY Courts of Assize:

Murder	1931	5	—	—	–
Other offences	1931	323	122	11	1
Murder	1932	6	—	—	–
Other offences	1932	288	191	18	–
Murder	1933	4	1	—	–
Other offences	1933	248	207	12	2
Murder	1934	1	—	—	–
Other offences	1934	302	166	27	–

No. of Defences undertaken at request of the Court under Section 3 (3) of the Act:

1931	120
1932	122
1933	76
1934	50

From the above figures two things stand out. The first is the increase in the number of defence certificates granted by examining justices during the three years for which figures are available. Thus in 1933 the total number of defence certificates granted by Justices was 940 as against 690 in 1931 and 867 in 1932. It appears that over this period there was an increasing tendency for justices to grant defence certificates on committal, a tendency clearly to be welcomed, since the advantage of having legal aid from the moment of committal, instead of having to wait until the case comes before the judge who is to try it, is far greater than most people imagine. Connected with this is the fall in the number of defence certificates (including defences undertaken at request of the court) granted by Courts of Assize, viz.: from 459 in 1931 to 340 in 1933.

(In 1932 the number was 434). From this it would appear that, as the tendency for examining justices to grant defence certificates on committal has increased, the number of cases in which judges have felt that a defence certificate should be granted has decreased. This view receives confirmation from the significant drop in 1933 in the number of defences undertaken at the request of the judge (79 in 1933 as against 120 in 1931 and 122 in 1932) which shows that there was a fall in the number of cases in which it appeared to the court that the prisoner was not yet but should be properly represented.

Another significant feature presented by these figures is to be found in a comparison of the number of cases in which legal aid was respectively granted or refused. Thus 940 defence certificates were granted by examining justices in 1933 as against 242 refusals, while the corresponding figures for Courts of Assize were 340 (including defences undertaken at request of the court) as against 207. The percentage of refusals is clearly much higher before Courts of Assize, although it fell somewhat in 1934. This again is a reflection of the fact that examining justices are tending more to grant legal aid in proper cases; on the other hand, it would also appear to show that judges of Assize are a long way from regarding the fact that a man has been committed for trial to Assizes as in itself a sufficient reason for granting him legal aid.

While however these figures show in some degree the various tendencies at work as between the different courts whose duty it is to administer the Act, they give no picture of the working of the defence certificate

system in relation to the total number of offences tried on indictment. In the following table, therefore, an attempt is made to show the proportion of cases in which defence certificates were granted to the total number of prisoners tried at Quarter Sessions and Assizes, on the basis of the figures for 1933:

No. of certificates granted by examining justices:		
On application	826	
Without application	114	
.....		940
No. of certificates granted by Quarter Sessions:		
On application	361	
Without application	24	
.....		385
Defences undertaken at request of Court of Quarter Sessions:		
.....		57
No. of certificates granted by Courts of Assize:		
On application	252	
Without application	12	
.....		264
Defences undertaken at request of Judges of Assizes:		
.....		76
TOTAL		1,722

No. of persons tried at Assizes	3,365
No. of persons tried at Quarter Sessions	5,836
	9,201

Thus, the proportion of defence certificates granted to the total number of persons tried was 18.7%. It thus appears that under one-fifth of the persons tried at Assizes or Quarter Sessions received legal aid under the Act. Information is lacking as to the other four-fifths, in regard either to their means or to the number who were in fact represented by counsel employed in the usual manner, and without such information any conclusions that may be drawn are only tentative. It is of course a fact that the more serious motoring offences have in recent times brought into the criminal courts, including the higher criminal courts, a substantial number of people having sufficient means to employ solicitor and counsel. Then again the more impressive forms of financial crime are usually undertaken by those who can afford to pay for their own defence or who have connections with someone who can do so. But even when these facts are taken into consideration it remains clear that the bulk of persons tried at Assizes and Quarter Sessions are persons who have not the means to pay for their own defence or who can only do so with the greatest difficulty. Even allowing for one-third of the persons tried at Quarter Sessions or Assizes without any grant of legal aid being represented at their own expense, it still leaves the figure of about 54% of those so tried who have to appear unrepresented at their trial on the more serious of criminal charges. It is of course only fair to say that some experienced criminals think that they are better off without counsel, and that the majority of prisoners plead guilty at their trial, so that their need for legal assistance is often

not as great as it would be if they were contesting the charge.

It may be urged that the figures of applications refused, high though they may be (728 in 1933), are small enough in comparison to the total number of prisoners charged at Quarter Sessions or Assizes to indicate that there is no general denial of legal aid to those who require it. There is obviously some force in this contention, but the number of accused persons who fail to apply for a defence certificate owing to ignorance as to the facilities for legal aid is probably considerable. It is understood that at the time of the passing of the 1930 Act the Home Office undertook to see that notices setting out the possibilities of obtaining legal aid should be displayed in cells. It is not known to what extent this has been done, but in any event it would not affect those who are not detained in custody either before or after committal. Amongst these latter are frequently to be found persons who have not hitherto come into conflict with the criminal law and who for that reason particularly should have legal aid. Moreover it often happens that a prisoner to whom a defence is available (e.g., the statutory defence open in certain circumstances to a man charged with carnal knowledge of a girl under the age of 16 and over the age of 13) may believe himself guilty and thus through ignorance of the law plead guilty without asking for legal aid.

A word requires to be said about the quality of the legal aid which is available for poor persons after it has been granted. After the passing of the 1903 Act there was, at any rate among members of the Bar,

a feeling that there was something derogatory in putting one's name on the list of those willing to act under the Poor Prisoners' Defence Act, and on at least one Circuit the Clerk of Assize used to dissuade young members of the Bar from so doing on the grounds that they might imperil their position in the eye of their fellows and of the judges before whom they might so appear. However this may have been, this feeling has now disappeared. It is the invariable practice for all members of the Bar who regularly attend Sessions or Assizes, and for solicitors whose practice extends to criminal work, to place their names on the appropriate list, and it may be said with confidence that those who do criminal work on Circuit or at Sessions are, apart from prosecutions, dependent for the bulk of their criminal practice upon poor prisoners' defences. For this reason these cases tend to receive the same degree of attention as those in which lawyers are instructed in the ordinary way. Moreover solicitors assigned to a poor prisoner tend to employ the counsel whom they are accustomed to employ in their ordinary work. It may in fact be said that in general poor prisoners who are granted a defence certificate at the time of committal, so that there is proper time in which to prepare their cases, receive as good service and attention as is usually available to those paying the market price, so to speak, at the court at which they appear, subject to the important qualification that they often suffer grave disadvantage from not having had legal aid during the proceedings in the police court, before committal.[1]

[1] As to the opportunity to obtain this aid, see pp. 207–8.

The position of legal aid for persons accused of crime and committed for trial may be summarised thus; that the system depends to a very large extent for its effective working upon the outlook and sympathy of those called upon to administer it; that judges and examining justices are on the whole attempting to work the Act, but that the system is still a long way from providing every prisoner who requires it with proper representation; that nevertheless three out of every four applications for legal aid are granted; and that the quality of the assistance available to poor prisoners when granted is on the whole good.

Coming now to the second head of the provisions for the grant of legal aid, viz., summary offences and proceedings before justices prior to committal to Assizes or Quarter Sessions, it is worth noticing at the outset what is the nature of these summary offences. They are mainly the creation of statute, and cover an enormous field, as can be seen from the fact that in 1934 631,117 persons were charged with summary offences, of whom 592,027 were found guilty. The overwhelming majority of these offences are however of a comparatively unimportant nature; about half the persons found guilty in 1934 were convicted of traffic offences, while a large proportion of the remainder were guilty of such offences as failure to take out dog or motor licences, or Sunday trading. On the other hand not all these offences are unimportant; in 1934, 11,468 persons were sent to prison without the option of a fine after conviction of summary offences; and indictable offences dealt with summarily involve, apart from Juvenile Courts, about 60,000 cases a year.

Until 1930 no facilities existed for granting legal aid for these cases. By the Poor Prisoners' Defence Act, 1930, however, provision is for the first time made for legal aid before courts of summary jurisdiction and examining justices. Section 2 of the Act lays down that, if it appears to a court of summary jurisdiction or examining justices that the means of a person charged before them with any offence are insufficient to enable him to obtain legal aid and that by reason of the gravity of the charge or of exceptional circumstances it is desirable in the interests of justice that he should have free legal aid in the preparation and conduct of his defence, the court or justices may grant in respect of him a certificate called a legal aid certificate. Thereupon the prisoner is entitled to have a solicitor (and counsel in cases of murder, if the justices think fit) assigned to him, whose fees are paid out of the funds of the local authority.

It will be seen that the test for the grant of a legal aid certificate, once insufficiency of means is established, is the gravity of the charge or the exceptional circumstances attendant upon it. These terms are not explained or defined in the Act, and it is therefore for the magistrates before whom the prisoner is charged to decide whether the charge is sufficiently serious, or the circumstances so exceptional, as to justify the grant of legal aid. It is not known whether any guiding principles for the grant of legal aid certificates have been suggested by the Home Office, but the figures of the number of certificates granted give some indication as to the manner in which the courts have as a whole interpreted the Act.

The figures available to date relating to legal aid certificates granted in respect of trials before courts of summary jurisdiction are as follows:—

	Applied for		Offered without application	
	Granted	*Refused*	*Accepted*	*Declined*
1931	150	66	29	3
1932	220	88	38	7
1933	214	105	19	–
1934	216	112	21	–

From these figures, taken by themselves and unrelated to other considerations, there stands out the significant fact of the steady growth in the number of refusals of legal aid certificates while the number of those granted (with the exception of 1931, the first year of the Act's operation) remained fairly constant. It would certainly appear from this that the tendency of justices has been to interpret the words of the Act "gravity of the charge or exceptional circumstances" with strictness. This conclusion is reinforced from a comparison of the number of legal aid certificates granted with the number of persons dealt with summarily. Of course, as has already been said, the greater number of those dealt with summarily are persons charged with summary offences, and the great proportion of these offences are of a comparatively trivial nature. A fairer picture can be obtained if the trivial charges are eliminated by taking only the figures of those tried summarily on charges of indictable offences; these figures are:—

	Persons tried summarily for indictable offences	Number of legal aid certificates granted
1931	58,317	179
1932	62,103	258
1933	61,264	233
1934	65,056	237

It is quite clear from the above table that the number of legal aid certificates granted in respect of the proceedings in the police court itself is negligible, and that to all intents and purposes the Act is, as far as the police court is concerned, a dead letter. It may be argued that the proper inference from this is that the indictable offences tried summarily are not of a kind sufficiently grave or surrounded by such exceptional circumstances as to justify the grant of legal aid. It is true that a good many such cases may be fairly simple, although it is extremely inadvisable to regard as trivial any matter which may lead to someone going to prison, especially for the first time. In 1934, for instance, of the 65,056 persons so dealt with, 47,184 were charged with various forms of simple larceny, and probably a number of them were clear cases of no exceptional importance within the meaning of the section. But few cases under our complicated procedure can be adequately conducted by laymen, and in any case, if the statistics are examined in a little more detail, it can be seen that many of the cases are far from trivial. The more numerous classes of indictable offences dealt with summarily in 1934 were as follows:—

Malicious wounding	1,053
Attempts to commit unnatural offences	228
Indecent assault on females	950
Housebreaking	644
Shopbreaking	2,996
Entering with intent to commit a felony	204
Embezzlement	1,060
Simple larcenies	47,184
False pretences	2,103
Receiving	2,123
Forgery	222
Attempt to commit suicide	704

In the above table only those offences have been given of which more than 100 were committed during the year. The table does however show that the list includes many offences which are *prima facie* of a grave nature, and on the trial of which it would, in the absence of special circumstances, be clearly in the interests of justice that the prisoner should be represented.

It is merely a by-product, so to speak, of the legislation that large numbers of persons charged with indictable offences and dealt with summarily when they should have been committed to take their trial before a jury, are almost certain to be deprived of legal aid whilst, if they had been so committed, their chances of being properly represented would be at least reasonable.

Turning now to the subject of legal aid before examining magistrates, it has already been said that a legal aid certificate may be granted to a person

appearing before examining justices on proceedings with a view to committal, and the figures concerning such certificates are as follows:—

	Applied for		Offered without application	
	Granted	*Refused*	*Accepted*	*Declined*
1931	251	59	71	7
1932	312	111	62	31
1933	336	120	86	3
1934	405	109	81	3

There has thus been a steady increase in the number of certificates granted to persons appearing on these proceedings, while there has been no corresponding increase in the number of refusals. This tendency is clearly to the good, and is to be welcomed. On the other hand, it emphasises the negligible number granted in connection with summary proceedings, and it is tempting to form the conclusion that magistrates as a whole take the view that no case tried summarily presents any real difficulty and that in consequence the provisions of the Poor Prisoners' Defence Act, 1930, on this point are unnecessary. (It is of course notorious that some benches of magistrates resent any prisoners being defended before them on any but serious charges; they regard it as a waste of time, preventing them from getting through their work and going about their own business or pleasure.)

Appeals form the third head under which legal aid may be granted. On appeals to the court of Criminal Appeal, that court may assign counsel, or solicitor

and counsel, to an appellant whose means are insufficient, if it appears desirable in the interests of justice. The registrar of the court has power to report to the court or one of the judges of it any case in which it appears to him that legal aid ought to be assigned, even though no application for legal aid has been made. Figures do not appear to be available as to the extent to which the above power of the court is exercised, but it may reasonably be assumed that in most cases in which leave to appeal against conviction is granted legal aid is also assigned if the appellant's lack of means warrants it. Legal aid is however rarely assigned in connection with appeals against sentence only.

On appeals from courts of summary jurisdiction to Quarter Sessions, the court from whose decision the appeal is made or the Court of Quarter Sessions may, under the Summary Jurisdiction (Appeals) Act, 1933, grant legal aid to the appellant or to the other party to the appeal where the means of either of them are insufficient. Here again the figures concerning legal aid on these appeals do not seem to be available. In 1934, however, only 521 appeals altogether were made to Quarter Sessions from decisions of courts of summary jurisdiction.

On appeals by way of case stated, legal aid may be granted under the Poor Persons Rules as in the case of civil proceedings in the High Court.[1]

This completes the survey of the facilities for legal aid in connection with criminal cases. The general conclusion that may be reached is that while the legal

[1] See pp. 177 *et seq.*

aid system is working to some extent in connection with trials before courts of Assize and Quarter Sessions, there is to all intents and purposes no system of legal aid before courts of summary jurisdiction.

In conclusion, is it possible to draw any general conclusions, or to make any general statement, upon the subject of legal aid to the poor man in the courts, whether as a civil litigant or as a defendant on a criminal charge? Plainly something can be stated. Firstly, it may be said that the piecemeal haphazard and unsystematic nature of the legislative provisions is wholly typical of our system generally. Secondly, it may be admitted that things are better than they were. The English Tory does progress. Show him convincing reasons for advancing a mile, and he resolutely steps a foot in the right direction; we should, it may be thought, be at any rate grateful that he does not go backwards or sideways. Thirdly, it is not unfair to say that many parts of the system are good "façade"; that is to say, they present an appearance on superficial examination of achieving much whilst really achieving little. But, most important of all, the whole structure shows save in a few rare points all the signs of the instinctive feeling of the upper and middle classes that the poor neither need nor deserve legal aid of good quality. If they are ill, well, they shouldn't be; and if they must be, let them have medicine of second-rate quality, and go without any treatment involving expensive drugs. If they need food, well, let them buy it cheap and bad, always providing they can pay for it. Is it housing, well, they don't need much, and they won't get much. Is it education,

well, grudge them every penny, and get them out as quick as you can to provide cheap labour. Is it unemployment maintenance, well, cut it down as far as you can. (Is it war, well, there, give them a front seat.) And, in the same way, if it is litigation or legal advice, let them have the leavings of the market; the very young and inexperienced lawyers, the waiting about at odd hours, the hasty and skimped consideration—all the badges of a humiliating charity. It is of course ineradicable. In a world where everything is controlled by profit-seeking, and it is commonly held that the hope of gain is the only inducement of human labour, skilled or unskilled, what sort of help can be expected from the present arrangements? It may indeed be added that they are unjust to lawyers as well as to the poor, for why should lawyers work for nothing, any more than anyone else?

This chapter would not be complete without a few observations on the plight of poor men who find that they have to conduct their own cases, without solicitors or counsel. In some countries, where the procedure is simple, and class-distinctions are less deep and widespread, the task of conducting one's own case is not so formidable; but with us everything conspires against the poor lay litigant, civil or criminal. In the first place, the Bench and the officials and the opposing lawyer will belong in almost all cases to the upper or middle classes, and will thus be separated from the litigant by spiritual, physical and cultural gulfs deeper than those which separate him from foreigners. Then the rules of evidence (designed in another age for his protection) seem to him to have been specially

fashioned for his torment, for almost everything that he naturally wants to say will be found to offend in form or in substance against one or other of the rules. In most, but by no means in all, cases he will find the court (even if it itself knows the law) disinclined to help him with explanations or assistance, even as far as in its complete ignorance of what his case is it could give him assistance that was not actually dangerous; it is in any event difficult, in civil cases, to give him any real help without appearing to take sides with him. Then the procedure, not having been designed for laymen, produces one especial annoyance. The litigant comes into court full of a natural and praiseworthy desire to say at once what his case is; but if he is the defendant the time for doing that does not arrive until the plaintiff or the prosecution have finished their case; and he ought to possess his soul in impatience for an hour or two. But meanwhile the principal witness against him will have gone into the box and given evidence, and should then be cross-examined by the lay litigant. The Bench asks him if he has any questions, and at long last the poor man is delighted to think that he is to be allowed to take an active part in the proceedings in which he is so vitally interested. He proceeds at once to state his case; but this is not in accordance with the procedure, and he must be stopped. A patient judge will explain to him that the time has not yet come for him to state his case; it will come later all right, but meanwhile he should merely ask the witness any question that he thinks will help his case or tend to correct anything which he thinks the witness has put wrongly. The

judge cannot help him to know what questions to ask, because that depends on what his case is, and the judge has just quite correctly refused to be told at that stage what it is. The poor fellow will then try to put questions, only to find that cross-examination is not as simple as it seems, and he will not produce much result. But if, as only too often happens, the judge or justice is not so patient, he will just say, after every statement the man makes, "Don't make statements, ask questions." Soon the man will give it up in despair, and when the time does come for him to state his case he will be in too much confusion to do so. And, indeed, however nicely he is treated, he will always find it difficult to state his case. The most fluent and intelligent of laymen, whether middle-class or working-class, have never caught the knack of realising that the person they are addressing knows nothing of their case or of the technicalities of their work, with which it very likely deals. It is not an exaggeration to say that, in all but the simplest cases, the best possible combination, viz.: a patient and well-mannered judge and an intelligent lay litigant, is still impotent to give any confidence that justice will be done, in the face of the two enemies of complex procedure and class-incomprehensibility. Nevertheless, as matters stand, we go on trying hundreds of thousands of cases, civil and criminal, with one or both parties unrepresented, and if just decisions are reached it is more by chance than by anything else.

In all the circumstances, it is not surprising that the bulk of poor people shun the courts; a working woman will say: "My family has never been in a

court" in much the same tone as she will say: "I am a respectable married woman", and all one's explanations that there is nothing disgraceful in appearing as a plaintiff in a county court, that unless one does so appear one will not obtain one's just rights, and that a civil court is nothing to do with a criminal prosecution, will be simply discounted as specious advocacy. Nor is it surprising that the many borderline cases of insanity, known to only too many lawyers, among people whose mental instability has been started by experience of litigation, contain a very high proportion indeed of people whose trouble has been started or accelerated by their having to litigate in one form or another as "poor persons".

CHAPTER IX

POLITICAL ASPECTS OF THE LAW

THE POLITICAL ASPECT of our legal system is not perhaps the most frequently discussed, but it is certainly not the least important. Here, once again, the middle classes will indignantly deny that there is any political aspect of our system, and will assert that the law is the same for everyone, and is no respecter of persons or politics. Truly, where ignorance is bliss, it is wise to be middle class.

In truth and in fact, the law has a very real political aspect, above and beyond the considerations that it is a purely middle-class institution, staffed by the middle classes and indelibly dyed with their views, instincts and outlook. Its directly political aspect is best illustrated by the attitude and behaviour of the courts and the Government in relation to prosecutions, major or minor, for what may be fairly called political offences.

It may be as well at the outset to describe shortly the weapons in the arsenal of the law and the executive, i.e., the various provisions of statute or common law establishing and defining the offences which are wholly or mainly of a political nature. Like the rest of English law, they form an inconsistent jumble of relics from different periods of our history, and are not easy to enumerate or define, or even to understand. I leave untouched the very large and important field of restrictive legislation relating to Trade Unions; even if

only modern examples of this were considered, it would make this book both too long and too technical.

Passing over treason, which is not of immediate practical importance for present purposes, the first political offence which needs to be considered is sedition. Sedition is a "common law" offence, not defined by statute; it is difficult to state accurately, and is dangerously elastic. It consists in general of words written and published, or spoken and published, with a seditious intention. The "seditious intention" can be inferred from the words themselves. There are perhaps five heads of seditious intention. The first is the intention to bring into hatred or contempt, or to excite disaffection against the King,[1] the Government and Constitution of the United Kingdom, either House of Parliament, or the administration of justice; but it is not seditious to attempt to show that the King has been misled or mistaken in his measures, or to point out errors or defects in the Government or Constitution with a view to their reformation. The second head is an intention to excite the King's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established. The third head is the inciting of persons to commit any crime in general disturbance of the peace. The fourth head—and we are here reaching a more important danger-zone—is the intention to raise discontent or dissatisfaction amongst the King's subjects; and the fifth, even more important than the fourth, is the intention to promote feelings of

[1] There were no prosecutions of any well-known politicians or leaders of the Church or of Society under this head in the year 1936.

ill-will and hostility between different classes of the King's subjects; but it is lawful to point out with a view to their removal matters which are producing or have a tendency to produce feelings of hatred and ill-will between classes of the King's subjects. (There is, moreover, some authority for the proposition that under the fifth head the offence is not committed unless the words are of such a nature as to promote disorder as a result of such feelings of ill-will).

The student is probably struck at once not only by the extreme vagueness of the definitions, but also by the fact that, literally interpreted, the law might embrace nearly all political propaganda that has any practical application to life. It was, indeed, defined (happily without authority) by a police officer at a recent trial for sedition as "saying anything I don't like"; and one can imagine that some of the more vigorous politicians would be inclined to say, like Monsieur Jourdain said of prose, that they have been talking it all their lives without knowing it. Even the late Professor Dicey, who could not be suspected of any left-wing leanings, wrote of it: "The legal definition of sedition might easily be used to assist to check a great deal of what is ordinarily considered allowable discussion, and would if rigidly enforced be inconsistent with the prevailing forms of political agitation."

On the point of vagueness, the law of sedition is only typical of a great deal of that part of the common law that serves to keep the masses in their place. There have been tendencies in the courts from time to time to limit the scope of the law of sedition in its actual application, but whenever any emergency occurs

the courts are found ready to abide by the wider view, and the charge is once again a formidable weapon in the hands of the executive. The truth is that, under various guises or disguises, the law presents the Government with a very wide collection of weapons for use in troublous times, but the Government has the good sense not to talk about them and in times of outward peace to use them relatively sparingly. But one very formidable example of what a modern Government is prepared to do can be found in the prosecution for seditious conspiracy of twelve Communists in the autumn of 1925. The Tory Government of the day was somewhat alarmed at the prospect of a General Strike, with which it was not then ready to deal, and had in effect bought six months' respite by giving a subsidy to the coal trade to enable it to continue paying the miners their old (inadequate) wages instead of attempting actually to reduce them. In the month of October of that year, no doubt as part of its material or psychological preparation for possible trouble, but nevertheless at a moment of complete outward peace, it suddenly descended upon the Communist Party of Great Britain and the Young Communist League. These two bodies had been conducting ordinary political propaganda for some years with practically no interference from the Government and not much more from the British Fascisti, but the charge, which was based almost entirely on publications of ordinary political propaganda, was that of "conspiring since the 1st January, 1924," (*sic*, so that the Government had apparently been idly watching this desperate conspiracy for nearly two

years) "to utter and publish seditious libels and to incite divers persons to commit breaches of the Incitement to Mutiny Act, 1797". The police arrested and charged in all twelve prominent Communists, and on arresting certain of them took possession of and carried away large quantities of documents. (Such seizures seem to have been almost common form with these guardians of law and order, but they are generally illegal, and in 1934, on a similar indiscriminate seizure, several Communists recovered damages in the High Court against two police inspectors and Lord Trenchard.[1]

It may be noticed that Sir William Joynson-Hicks, the Home Secretary, immediately indulged in what even "The Times" described as "a most improper whoop over the arrest of his still unconvicted Communists", informing a gathering in his constituency that warrants had been applied for against a certain number of "notorious Communists", and that several of them were already in custody. "When this trial is over," he said, "those of you who are Communists will be ashamed of yourselves." Any lawyer should have known that such an observation was grossly improper, but Joynson-Hicks although a lawyer was not conspicuous either for discretion or intelligence.

When the case was formally developed in the "opening" of prosecuting counsel at the police court on the 24th October, not much doubt was left as to the attitude of the Government. Counsel described both the Communist Party of Great Britain and the Young Communist League as "illegal organisations",

[1] See p. 271

and asserted that the accused were "all engaged in an illegal conspiracy, preaching the doctrines of what they call Communism. All persons who disseminate either by word of mouth or by published writings the doctrines which these persons call Communism are liable to be prosecuted for one or other of the branches of what is commonly called sedition—uttering seditious words or publishing seditious libels. Communism hails from Russia.

"Communism is illegal because it involves three things, (1), the overthrow of the constituted Government of the country and the established forms of government by force; (2), the creation of antagonism between different classes of His Majesty's subjects—'class war'; (3), the seducing from their allegiance of the armed forces of the Crown.

"The ultimate object of the doctrine of Communism is the overthrow of capitalism and the establishment of the dictatorship of the proletariat."

He added in all seriousness that one of the accused had been heard to say that he hoped to see the Red Flag flying on Buckingham Palace!

(The accused were given bail pending the police-court proceedings, and it was on this occasion that Bernard Shaw, who was one of the sureties, when asked the stock question: "Are you worth £100?", made his famous answer: "Well, I have that much money!")

The twelve were all commited for trial at the Central Criminal Court, where the indictment consisted of three counts, in which they were all accused, between the 1st January, 1924, and the 21st October, 1925, of (1) conspiring to publish and utter seditious

libels and words; (2) conspiring to incite persons to commit breaches of the Incitement to Mutiny Act, 1797; (3) conspiring to endeavour to seduce from their duty persons serving in His Majesty's forces to whom might come certain publications, to wit the "Worker's Weekly" and others, and to incite them to mutiny.

The prosecuting counsel was this time the Attorney-General himself; his speech was much on the lines of counsel in the police court. The jury duly convicted all the prisoners, and the judge sentenced them all to terms of imprisonment, after offering to some of them not to do so if they would renounce Communism and all its works, which they all refused to do.

What really forms an interesting contrast, and at the same time a complete exposure of the class nature of such proceedings, is to consider for a moment some of the speeches made by Carson, F. E. Smith (Lord Birkenhead) and Joynson-Hicks, of a far more serious nature, and at a far more serious time, in 1912 to 1914, over the proposal to grant Home Rule to Ireland, which did not suit their Ulster friends. It will be remembered that there was a good deal of "gun-running" into Ulster, an Ulster Volunteer Force was openly organised and drilled, and speeches which appeared to most people to be openly treasonable were made. No prosecution, however, was even launched; the fundamental issue of the existence of capitalism was not involved, the persons implicated were members of the middle class, and every class argument was against their being touched. Middle-class juries, indeed, might have acquitted them. But what they said was far worse, fairly considered in

context and circumstances, than anything proved against the Communists at the Central Criminal Court.

F. E. Smith, speaking at Liverpool on the 22nd January, 1912, at a relatively early stage of the Home Rule controversy, said:

"There is no length to which Ulster will not be entitled to go—however desperate or unconstitutional—in carrying the quarrel—if the quarrel is wickedly fixed upon them—and I say without hesitation that in any resistance to which Ulster might be driven, rather than submit to Home Rule on which the constituencies have not been consulted, she would command your support and she would command my support, and I am the last man in the world to recommend any other man to take risks which I would not be prepared myself to share."

A few months later, speaking at Blenheim on the 27th July, 1912, Sir Edward Carson said:—

"We will shortly challenge the Government to interfere with us if they dare, and we will with equanimity await the result. We will do this regardless of all consequences, of all personal loss, or of all inconveniences. They may tell us, if they like, that that is treason. It is not for such men, who have such issues at stake as we have, to trouble about the cost. We are prepared to take the consequences, and in the struggle we will not be alone, because we have the best in England with us."

A little later, at Lisburn, County Antrim, on the 19th September, 1912, the same gentleman said:—

"I promise you, with all the sacred confidence that you and I ought to feel towards one another, that if

this (Home Rule) policy is persisted in there is no length that may be necessary, no sacrifice that may be compulsory, that I and others who are associated with me are not prepared to take in the defence of Ireland."

Two days after, at Coleraine, doubtless in some confidence that one of his standing would not be charged with treason, he became more precise:—

"Here is what the Covenant says—In the event of such a Bill being forced upon us we further solemnly and mutually pledge ourselves not to recognise its authority. I do not care twopence whether it is treason or not; it is what we are going to do."

In the spring of the following year, on the 16th May, 1913, in the inflammable city of Belfast, he delivered himself thus:—

"Go on, be ready. You are our great army. It is on you we rely. You must trust us to select the most opportune methods for, if necessary, taking over the whole government of the community in which we live. I know a great deal of that will involve statutory illegality, but it will also involve moral righteousness."

Later, on the 7th September, 1913, the same Sir Edward Carson said:—

"I do not hesitate to tell you that you ought to set yourselves against the constituted authority in the land. . . . But the danger and the difficulties will be great. There will be the danger and difficulties of trying to run a Government of our own against the constituted authority under the Home Rule Bill. . . . We will set up that Government—I am told it will be illegal. Of course it will. Drilling is illegal; I was reading

an Act of Parliament forbidding it.[1] The Volunteers are illegal, and the Government know they are illegal, and the Government dare not interfere with them. . . . Don't be afraid of illegalities; illegalities are not crimes when they are taken to assert what is the elementary right of every citizen, the protection of his freedom, and if anyone tells me I should be ashamed of myself, I tell him it is the motive I live for, and if I am threatened I am prepared to defend myself. . . . We will not allow any individual or any body of men, whether they call themselves a Parliament or a Government, to take away what we consider essential for the carrying on of our rights and privileges."

F. E. Smith, who was a "galloper" in the Ulster Volunteer Force, was not to be left behind in treason. In some speeches he made in County Antrim, on the 20th September, 1913, he said:—

"Home Rule will be dead for ever on the day when 100,000 men armed with rifles assemble at Balmoral (Belfast). . . ."

And again:—

"From that moment (the passing of the Home Rule Bill) we on our part will say to our followers in England: 'To your tents, O Israel! From that moment we shall stand side by side with you, refusing to recognise any law, and prepared with you to risk the collapse of the whole body politic to prevent this monstrous crime.

[1] Sir Edward Carson was not a very good lawyer, but he was quite correct on this point. The Unlawful Drilling Act, 1819, one of the famous "Six Acts", rendered Sir Edward Carson liable to seven years' penal servitude.

The sands are running down in the glass. The time has arrived for action on your part and ours."

A little later, at Armagh, on the 4th October, 1913, he repeated:—

"We shall make England realise that it (the establishment of a Home Rule Parliament) can never be done, the more easily, the more swiftly, and the more triumphantly your Volunteer movement advances. I hope to see at an early date those men who have undergone the necessary discipline and drill armed with real rifles. On the day on which there be in Ulster 100,000 disciplined men armed with rifles, where ever else Home Rule may be talked about, it will never be talked of in Ulster."

Sir William Joynson-Hicks did not want to be left behind. At Warrington on the 6th December, 1913, he thus allied the Tory Party, God Almighty, and plain treason:—

"The people of Ulster have behind them the Unionist Party. Behind them is the Lord God of Battles. In His name and your name I say to the Prime Minister: 'Let your armies and batteries fire Fire if you dare; fire and be damned!'"[1]

[1] In 1925, on a vote of censure moved on the then Government for having launched the Communist prosecutions mentioned above, Joynson-Hicks had this speech pointedly brought to his notice. By way of "defence" he was good enough to say that he regretted having made the speech, and added: "I at all events was not involved in any of the activities." So noble was he; it is perhaps fitting that he reached the House of Lords before he died.

on similar treason, if it thought that it would escape prosecution? In the twelve years that have elapsed since 1925, every class conflict and every international conflict has sharpened in tone and urgency. Respect for civil liberty in England has diminished considerably, and courts, juries, and magistrates have certainly grown no less accommodating. There are several new weapons in the legislative arsenal,[1] and nothing has occurred to make the executive either unwilling or unable to use the dangerous vagueness of the law of sedition itself.

So far as the punishment of sedition is concerned, it is punishable, for a first offence, with up to two years' imprisonment with or without a fine of unlimited amount in addition. For a second offence it is punishable as a "high misdemeanour", which apparently means imprisonment for an indefinite period. It is specially provided that persons imprisoned for sedition must serve their sentence in the comparative luxury of the first division. The cynic may be disposed to think that Parliament thought sedition was an offence that might be committed by members of the middle class; but the prosecution can and does nearly always deprive the accused of this advantage by indicting him for conspiracy. The additional sentence of exile was removed as long ago as 1830, and it was never punishable with death. It is a mistake to suppose, as is sometimes done, that in the case of a second offence the offender can be publicly or privately whipped in addition; (that punishment is still available for all who "wilfully have any dangerous matter or thing

[1] See pp. 229–32, 236–7, 260–7.

with intent to alarm the King", but even here criminal reform makes progress, for in 1914 the number of such whippings that could be inflicted for any one such offence was reduced from three to one).

It is worth noticing at this stage an amusing statutory crystallisation of the old bit of middle-class nonsense about "alien agitators". Museum-students of such publications as the "Daily Mail" will remember that, when any section of the working class is driven by bad wages or conditions to strike or even to threaten to strike, the cause of the trouble is often explained as "alien agitators" (as if working men who could not see a grievance for themselves would believe in its existence if a foreigner asserted it in broken English). The students will be interested to learn that, in 1919, this particular stupidity found its way into an Act of Parliament, and it is now the law that any alien who promotes or attempts to promote industrial unrest in any industry in which he has not been bona fide engaged for at least two years immediately preceding, in the United Kingdom, can be sent to prison for three months, and be deported; whilst any alien who attempts or does any act calculated or likely to cause disaffection among the civilian population may be sent to penal servitude for ten years, and of course deported.

The next important offence in this branch of "political" law is "Incitement to Mutiny". This was first made an offence in 1797, under the influence of the excitement caused by the Mutiny at the Nore, and at a time of considerable unrest, both international and industrial. It forms a striking contrast between

those reactionary days and our own period of freedom and democracy that, whereas statutes like the Emergency Powers Act, 1920,[1] and the Incitement to Disaffection Act, 1934, (see below), are passed as permanent statutes, the then Government did not venture in the first instance to make this Act more than a purely temporary measure, and it was not made permanent until twenty years later. It provides that everyone who maliciously and advisedly endeavours to seduce anyone serving in His Majesty's forces from his duty and allegiance, or who incites anyone so serving to commit any act of mutiny or to make or endeavour to make any mutinous assembly or to commit any traitorous or mutinous practice, may be punishable with anything up to penal servitude for life. Under this Act, persons distributing political literature to the Army or Navy or Air Force are not infrequently sent to prison for long terms.

The Incitement to Disaffection Act, 1934, which looks like a sort of "popular edition" of the Incitement to Mutiny Act, has a curious history. When the Bill was first introduced, it was discreetly heralded in the chloroform press as an unimportant measure, designed, it was suggested, primarily to deal with Fascists. On examination, however, it proved in its then form to be so outrageously loose and wide in its terms that one would have thought the Government was expecting a revolution on the following Wednesday. No one could find out why it had been introduced, but it had at any rate the remarkable effect of binding together in a United Front the forces of the left and centre in a

[1] See pp. 265-7.

way which nothing else except the Unemployment Assistance Board could have achieved. Quakers and Pacifists, Liberals and the few surviving genuine Conservatives, Socialists and Communists, all combined in a furious attack on the Bill, and in spite of the tiny numbers that the opposition then mustered in the House of Commons the Bill was gradually whittled away until it was not much worse than the Incitement to Mutiny Act. In its final form, on the Statute Book, it makes it an offence maliciously and advisedly to endeavour to seduce any member of His Majesty's forces from his duty *or* allegiance. (The older Act says duty *and* allegiance.) It then creates an additional offence of having in one's possession or under one's control, with intent to commit or to aid abet counsel or procure the commission of the offence of endeavouring to seduce above-mentioned, any document of such a nature that the dissemination of copies among members of the forces would itself constitute the main offence. It then gives power, somewhat limited, to issue search warrants in respect of specified premises where it is reasonably suspected that evidence may be found of the commission of an offence under the Act. The Act provides penalties which in no case exceed two years; so that to seduce a soldier from his duty *and* allegiance may send you to prison for life whilst to seduce him from his duty *or* allegiance will be much less serious. But even in its emasculated form it will provide the police in any time of tension with quick and convenient weapons for harrying the left wing. It may, indeed, be that one of the motives of the Government was to equip itself with power to bring cases

which would otherwise fall only within the Act of 1797 before magistrates, so that if at any time they should feel doubtful about getting juries to convict they could at any rate safely get a conviction before magistrates.[1]

There is also still on the Statute Book the Unlawful Oaths Act, 1797, a cousin as it were of the Incitement to Mutiny Act. It makes it an offence to take any part in administering or taking an oath binding persons to engage in any mutinous or seditious purpose (e.g., to make a speech which may make its hearers discontented or dissatisfied) or to disturb the peace, or to obey the orders of any committee not lawfully constituted, or of any leader not having authority by law for that purpose, and various other similar activities. In times of relative calm, it is not perhaps important, but it is one more weapon resting, possibly impatiently, in the armoury of reaction, and it carries a penalty up to seven years' penal servitude. It was of course the statute used in the case of the Tolpuddle Martyrs. That case was such a striking example of the way in which the law can be bent to ends for which it was never intended, that it is perhaps worth while stating it shortly here; for there is no reason to suppose that in time of emergency either the Government or the courts would behave very differently now from what they did then.

It will be recalled that what the men of Tolpuddle had done was quite simply to form a Trade Union, an act perfectly lawful even as long ago as that, but one which profoundly perturbed the governing class at a time when Union activity was very marked in the

[1] See pp. 275-7.

industrial areas and the idea of it spreading to the rural parts was extremely distasteful. The problem, of course, for the authorities was to have the men found guilty of some offence, and their minds turned first to this Act, which had been passed in the same year as the Incitement to Mutiny Act for the reason, as stated in its preamble, that "divers wicked and evil-disposed persons have of late attempted to seduce persons serving in His Majesty's forces by sea and land, and others of His Majesty's subjects, from their duty and allegiance to His Majesty, and to incite them to acts of mutiny and sedition, and have endeavoured to give effect to their wicked and traitorous proceedings by imposing upon the persons whom they have attempted to seduce the pretended obligation of oaths unlawfully administered." After this preamble, the Act went on to make it a felony, punishable by transportation for not more than seven years, to take any part whatever in administering an oath purporting or intended to bind the person taking it to engage in any mutinous or seditious purpose; or to disturb the public peace; or to be of any association formed for any such purpose; or to obey the orders or commands of any committee or body of men not lawfully constituted, or of any leader or commander or other person not having authority by law for that purpose; or not to inform or give evidence against any associate, confederate, or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done or to be done; or not to reveal or discover any illegal oath which may have been administered.

The general nature and seriousness of the sort of activity intended to be covered by this Act was indicated and emphasised by its concluding provisions, the first to the effect that "any person who shall be tried, and acquitted or convicted of any offence against this Act, shall not be liable to be indicted, prosecuted, or tried again, for the same offence or fact, as high treason or misprision of high treason," and the second that nothing in the Act was to prevent any person guilty of an offence against the Act, and not tried for the same as an offence against the Act, from being tried for the same as high treason or misprision of high treason.

Nevertheless, it was possible for the authorities, if they desired—as they did—at all costs to prevent the formation or growth of Trade Unions, to apply the Act to matters for which it had plainly not been intended and which had in them no element of treason, mutiny, or sedition. If one ignored the preamble and the context, one could say that Loveless and his friends had administered an oath binding the persons taking it, *inter alia*, not to reveal any unlawful combination; and, if it could by any means be made out that the combination was unlawful, the trick was done. Now here another Act, passed in 1799, again for a wholly different purpose, came to the rescue. This Act, the Unlawful Societies Act, was passed, according to its preamble, on account of "a traitorous conspiracy, in conjunction with the persons . . . exercising the powers of government in France, to overturn the laws, constitution and government . . . both in Great Britain and Ireland", and on account of various

societies having been formed of a new and dangerous nature, particularly what were then called "Corresponding Societies", which, according to Mr. G. D. H. Cole ("The Martyrs of Tolpuddle," p. 202) "were, in fact, engaged in a strictly pacific agitation for Parliamentary reform and the recognition of (Thomas Paine's) The Rights of Man." But, after this imposing beginning, its second section provides that every society whose members were required to take an oath not authorised by law should be taken to be an unlawful combination. Accordingly when the two Acts, passed to defend the realm against the horrors of naval mutinies and French revolutions, were read together, the administration of an oath not to reveal a combination which administers such oaths became a felony punishable with seven years' transportation. And so, in order to stifle the lawful formation of Trade Unions, the now famous Martyrs were sentenced to transportation for seven years for, in effect, administering an oath to certain persons not to reveal the existence of a combination (viz., a Trade Union) which administered such oaths. The whole thing worked beautifully; it is not surprising that one Dorsetshire landowner, Portman, wrote to another Dorsetshire landowner, Frampton, when the plot was hatching: "It seems to be desirable to expedite the blow and to allow it to come from the Judges if possible at once", or that Frampton subsequently wrote to the Prime Minister: "The conviction and prompt execution of the sentence of transportation has given the greatest satisfaction to all the Higher Classes, and will, I have no doubt, have a great effect amongst the Labourers."

It cannot be said that Sir Stafford Cripps was expressing himself too strongly when he wrote, in his criticism of the case in "The Martyrs of Tolpuddle" at p. 120:

"When the dominant class in a country are in fear of events which may revolutionise society as they conceive it to be ordered, they are apt both in their legislature and in their Courts to stress the necessity for the preservation of the social order. In so doing, the Courts, feeling the impact of this necessity, will almost always be ready to strain the interpretation of statutes and to bias justice in favour of the dominant class and against any whom they believe, rightly or wrongly, to be disposed to changes which may have the effect of upsetting the existing order."

At p. 123, he adds that "this is a typical case where the actual words of the . . . statutes were wide enough to give the Court the opportunity if it so desired, of bringing the acts of the accused within the letter of the law".

The Unlawful Drilling Act, 1819 (the Act which Sir Edward Carson "had been reading") is also still in force. It is one of the famous or infamous "Six Acts" of 1819, and one can well imagine it being willingly used again, in spite of the way the Ulster Rebels were spared in 1912-14, and of the fact that it has not been invoked against the Fascists. It was, indeed, thought worth while, by the Firearms Act, 1920, to amend it expressly. By this Act, all meetings and assemblies of persons for the purpose of training or drilling to the use of arms or practising military evolutions without lawful authority from the Government may be

punished with as much as seven years' penal servitude for those who drill others, and two years' imprisonment for those who are drilled. The power to give such authority was entrusted by the Act itself, in effect, to the Lord Lieutenant of the County or to two Justices of the County; by the amendment in 1920, it was provided that it should reside instead in "a Secretary of State, or any officer deputed by him for the purpose".

There is another somewhat important group of offences which must not be overlooked, viz.: unlawful assembly, rout, and riot. In any time of lock-out, strike, or other industrial trouble, meetings and demonstrations are often stopped and broken up by the police, and the law relating to these offences, not in itself a particularly unreasonable law, if honestly applied by impartial courts, although like many others dangerously vague and elastic, is invoked against the unfortunate demonstrators. An unlawful assembly is defined as an assembly of three or more persons either intending to commit a crime by open force or else intending to carry out any common purpose, even a perfectly lawful one, in such a manner as to give to firm and courageous persons in the neighbourhood reasonable ground to anticipate a breach of the peace. To take part in such an assembly, even before it has moved to the execution of its purpose, is a criminal offence, punishable by fine and imprisonment (unlimited theoretically in point of time, but in practice limited to two years).

Rout is unimportant as a separate offence. When an unlawful assembly starts to move to the execution

of its purpose, it becomes a rout. The punishment is the same.

Riot, which also has the same punishment, is in effect an unlawful assembly carrying out its purpose (lawful or unlawful); but it is generally independently defined as a tumultuous disturbance of the peace by three or more persons who assemble together without lawful authority with an intent mutually to aid one another against any who oppose them in the execution of some purpose (even lawful in itself) and who actually begin to execute their purpose in a violent manner to the terror of the people. The distinction between a riot and a treasonable assembly lies in this, that the purpose must be of a "public" nature to make an assembly treasonable, whereas any private purpose will suffice for a riot. To gather together a procession to Trafalgar Square to protest against the Means Test, if you are determined to force your way into the Square in spite of police opposition, will be a riot if the ensuing conflict with the police frightens people; but you will not be guilty of treason unless you are moved by, say, the treasonable purpose of opening the prisons.

"Reading the Riot Act" is a phrase which often puzzles, and its explanation is interesting. The friends of "loranorder", as early as the beginning of the reign of George I, in 1714, were somewhat perturbed by the difficulties of dispersing unlawful assemblies and riots. It was true, of course, that police and soldiers could be used to disperse the crowds, and that some degree of force could be applied; and it was equally true in practice that large numbers of the crowds could be arrested, charged, convicted and imprisoned. But

difficulties arose from a curious distinction in English law between felonies and misdemeanours. Those offences which our ancestors regarded as more serious are felonies by common law, and any offence which any statute says shall be a felony is of course also a felony. But any offence which is not a felony is only a misdemeanour. Now, subject to certain qualifications, you may kill people to stop them committing a felony if that is the only way to stop them at the moment, but you must not kill people merely to stop them committing a misdemeanour. The authorities were in those early days of the eighteenth century greatly mortified by the circumstance that unlawful assemblies and routs and riots were only misdemeanours, and that they could not accordingly fire on the rioters without risk of untoward consequences to themselves, unless the crowd was clearly proceeding to indulge in some specific acts which amounted to felony. This was most inconvenient. To disperse a crowd by firing on it was far quicker, and was likely greatly to diminish the trouble; indeed, it might put an end to it for good, and so avoid the necessity for enquiring into grievances and perhaps even raising wages. Accordingly, they hit on the bright idea of providing machinery for turning a riot into a felony; and this is how they did it. They passed the Riot Act, 1714, which provides that if any persons, to the number of twelve or more, are unlawfully riotously and tumultuously assembled together to the disturbance of the public peace, it is the duty of the justices, or the sheriff, or the mayor, to go to the place where the rioters are and read a proclamation which is set out in the Act (hence the

inaccurate but expressive phrase, "Reading the Riot Act"). If persons to the number of twelve remain or continue together "unlawfully riotously and tumultuously" for one hour thereafter, they become felons. You can then fire with a clear conscience so far as the law is concerned. If you kill them they are dead and you are justified; if you don't you may still give them penal servitude for life for the felony of which they are thus guilty. All the rules must be carefully observed; whoever reads the proclamation must read it all, word for word, or there is no felony; and he must get as near to the rioters as he safely can, and read in a loud voice, although it does not matter whether they actually hear him or not.

The offence of conspiracy comes next for examination. It is a very wide offence, by no means confined to politics or to public activities of any kind, although of particular importance in those fields of activity. The actual definition of the offence is "an agreement of two or more persons to do something contrary to law or wrongful and harmful towards another person, or to use unlawful means in the carrying out of an object not in itself unlawful". Conspiracies are of the most varied character. They may be conspiracies to commit murder, or to make seditious speeches, or to "rig the market", or to hiss a play, or to secure a man's dismissal from his job. But the importance of conspiracy in connexion with any form of demonstration or disturbance arises, curiously enough, from an odd development of the law of evidence, which merits explanation. In its early development, the law was at great pains to ensure that no man should be

prejudiced at his trial by the admission in evidence of what may have been said or done by other people not proved to be acting with him. But of course if anyone was proved to be his agent, or otherwise acting with him, then it was held right that not merely what that person did but also what he said, so far as it was connected with the purpose or activity in which he was agent for the accused, should be admissible in evidence against the accused. It was soon realised that, as conspiracy was based on agreement, if some evidence was given that 3, or 30, or 3,000 people had agreed together to do something, anything said or done by any one of them in pursuance of the conspiracy was admissible against all the others. This removed all difficulty; in any charge of conspiracy (and the same applies in effect in riot and frequently in sedition) the prosecution has only to show some evidence that the men were acting in concert, so that an agreement can be inferred; and then, substantially speaking, everything that any one in the crowd said or did can be given in evidence against any member of the crowd who happens to have been charged.

The dangerous vagueness of conspiracy charges can be demonstrated by reference to the Communist trial at the Central Criminal Court.[1] In general, charges and indictments have in fairness to prisoners to be pretty strictly defined and limited, so that men may know precisely the accusation and prepare to meet it; but in many cases of conspiracy, as in that case, the period of time involved may be very long, and the time and place and details of the numerous matters

[1] See pp. 218–21.

relied upon to establish the conspiracy need not be and are not specified, since technically the accused are not charged with these various acts as specific charges but merely with one over-riding conspiracy or agreement to commit them.

It is also worth notice at this point that the Government has a weapon of the criminal law that may be used even against those who are not alleged to have committed any crime at all. It arises in this way. By the statute of 1360, 34 Edw. III, cap. 1, it was laid down that the justices should have power to enquire about "all those that have been pillors and robbers in all the parts beyond the sea, and be now come again, and go wandering, and will not labour as they were wont in times past, and to take and arrest all those that they may find by indictment or by suspicion, and to put them in prison; and to take of all them that be (not)[1] of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people, and the other duly to punish, to the intent that the people be not by such rioters or rebels troubled nor endamaged, nor the peace blemished, nor merchants nor other passing by the highways of the realm disturbed nor put in the peril which may happen of such offenders." In the course of years of judicial decision, it has been gradually established that under this statute the justices may order any person to give security for his good behaviour, or in default to go to prison, although he has never been a "pillor or robber", and although he has never

[1] As a result of uncertainty in the text, it is impossible to determine whether the word "not" should really appear or not.

committed and is not even alleged to have committed any criminal offence, upon the ground that it is suspected he may be going to cause a breach of the peace, without even any apprehension of violence or anyone being put in bodily fear.

A very striking illustration of the use of this power, with the application at the same time of a favourite trick of the authorities of trying temporarily to "put away" political leaders at times of important political activity, occurred in the month of December, 1932. At the time, hunger-marchers were arriving in London, and it was desired that a deputation should be received by the Prime Minister on the 19th December, 1932, to present a petition, and should also be allowed to state their views to the House of Commons. It might be thought that there was nothing very terrible or criminal in that, but nevertheless on the 16th December Tom Mann was arrested (yes, arrested) and brought before a magistrate as

"a disturber of the peace and an inciter of persons to take part in mass demonstrations which are calculated to involve . . . contraventions of the provisions of the Seditious Meetings Act, 1817, and as such are subject to the provisions of the statute of 34 Edw. III, cap. 1."

(The relevant provision of the Seditious Meetings Act, 1817, one of Lord Sidmouth's "Gagging Acts", prohibits the calling or holding of any meeting of more than fifty persons anywhere within one mile of Westminster Hall "for the purpose or on the pretext of considering of or preparing any petition . . . to . . . either House of Parliament for alteration of Matters in Church or State".)

The case against Mann was put thus; firstly, that on the 5th December the "Daily Worker" had contained an article running:—

"Unemployed. Call for action on December 20th (*sic*). Fight for petition to be presented to Parliament. . . . The call to action calls for mass action to secure Winter and Christmas relief, abolition of the Means Test, and for the right of hunger-marchers to present the Means Test petition to Parliament";

and, secondly, on the 9th December, a letter had been sent by the National Unemployed Workers' Movement to the Prime Minister requesting him to allow a deputation of unemployed and employed representatives to wait upon him on the 19th December and present a petition signed by one million signatories, and to state their views before the House of Commons. The name of Mann was printed on the notepaper of this letter as one of the officials of the N.U.W.M., but it does not appear from the report that any evidence was given to show that Mann had anything to do with the letter, however harmless it may have been.

The argument for the prosecution, on this evidence, was this: firstly, a connexion is shown between the N.U.W.M. and the publication in the "Daily Worker", and Mann and Emrhys Llewellyn (who was the actual signatory of the letter and was arrested and charged with Mann) are responsible for the N.U.W.M.; secondly, the mass meeting mentioned in the "Daily Worker" was intended to enforce the receiving of the deputation; and, thirdly, it is likely, as on former occasions, that large crowds will assemble in Trafalgar

Square and surrounding streets, and on two previous occasions there has been violence as a result.

Evidence was given that on two previous occasions some weeks previously there had been violence, but not that Mann had been in any way connected with it.

The magistrate gave judgment thus:—

"There has been a misapprehension as to the nature of these proceedings. No criminal charge has been made, and there is no question of imprisonment (*sic*). The proceedings are merely putting in force the law of the land . . . for the protection of public order. It is merely a preventive measure. . . .

"It is clear that there was a mass meeting announced and arranged for Monday (the 19th) which was to present a petition to the Houses of Parliament. In my view there would be a massed mob within the vicinity of the House of Commons. There is nothing to prevent anyone presenting a petition to the House of Commons at any time, but it is most undesirable that such a petition should be presented by an organised mass of people marching on the House of Commons. It is common knowledge that this mass of people are meeting on Monday to make this mass demonstration under exactly the same conditions as the meeting in October when there was grave disorder. I do not say that the present defendants were responsible for that; but it shows what such meetings are likely to produce and against which I as a magistrate have sworn to preserve the peace."

The magistrate then discussed certain offences alleged to have been committed by two other persons who were not before him, and concluded by ordering

each of the defendants Mann and Llewellyn to enter into their own recognisances in £200 and to find two sureties in £100 each to keep the peace and be of good behaviour for twelve months. In default, he said, they must go to prison for two months. They refused to be so bound, and accordingly went to prison for two months, not merely without having been convicted of a crime but without even being accused of one.

This case illustrates among other things the increasing tendency of the authorities to attempt by any means in their power to prevent any meeting or demonstration (or at any rate any meeting or demonstration not organised by Fascists) taking place when any risk of disorder is present, instead of allowing it to take place and giving themselves the trouble of preserving order.

The excessive anxiety to prevent the most distressed sections of the community from appearing before Ministers or Parliament and expressing their tragic situation in their own words was illustrated in a fashion which would be amusing if it were not so foolish by Lord Baldwin in the debate in the House of Commons on the 11th November, 1936. He had refused either to receive the representatives of unemployed hunger-marchers himself or to allow them to be heard at the Bar of the House. Mr. Attlee had pointed out that the representatives of the great industries had never any difficulty in putting their views before the Cabinet and the Government, and indeed that what the House of Commons was often asked to do in legislation was merely to give its approval to arrangements made outside the House with such interests. Mr. Baldwin, as he then was, in a longish speech, made no attempt

to answer the comparison drawn by Mr. Attlee, but quite plainly suggested that, if the reception of deputations of marchers either directly by Ministers or at the Bar of the House was once permitted, the door would be open to civil war! Some of his hearers may well have wished that the decaying fabric of the capitalist state was really as fragile as this honest old gentleman suggested; but he laid himself open to a devastating comparison, in a reply by Sir Stafford Cripps, between citizens who had to march and so could not safely be received and citizens who drove up in Rolls Royce cars and could be received at once.

The law of public meeting and the recent Public Order Act also require consideration. The law of public meeting is curious; in one sense, it does not exist. Nowhere in the common law or in any statute can one find a provision that anyone may hold a meeting. The right arises, so far as it exists as a right, from the absence of anything necessarily unlawful in the holding of a meeting. Two people may lawfully meet and talk, so long as they can find somewhere to meet without being turned away by the owner of the land, and so long as their conversation does not infringe any of the numerous provisions of the common statute law noted above. And if two may meet and talk, so may 200 or 2,000, on the same conditions. And why should not one do all or most of the talking? Or at any rate one at once? And why should he not speak loud enough for all the rest to hear? And that is the way in which public meetings may be said to be lawful. And apart from questions of unfriendly persons causing a disturbance, or of the speaker saying

something unlawful, the main difficulty about holding public meetings is to find the necessary space. One cannot use private property without permission; and even the highway is private property, subject only to the right of the public to use it for passing to and fro—not for standing in groups to hold meetings. That does not of itself mean that the police can stop meetings being held in the street, for there is nothing criminal in using a man's land without his leave, and the police are not to protect him from such use unless he asks them to do so. But as soon as the meeting, by reason of size or position, interferes with the traffic on the highway, there is a minor criminal offence of obstructing the highway, and the police can insist on its moving; and if anyone at the meeting takes the view that the police are wrong and that there is no obstruction, and continues the meeting, he runs a good chance of being arrested then and there for obstructing the police in the execution of their duty. All this, it will be noted, is irrespective of anything that may be said at the meeting; and in theory the difficulties of this position will apply equally to Tory meetings or recruiting campaigns as fully as to any other type of meeting.

In actual practice, the police can exercise a very large measure of control as to what meetings are held in public places and what are not. Apart altogether from considerations of traffic—and it must be remembered that it is of no use to hold a meeting where no one can find it, and that accordingly meetings are sure to be somewhere near the traffic—no meeting is of any life or value unless someone says something

that stimulates interest, if not opposition. And, so soon as any appreciable noise or movement is present the police (so long as they can rely on the magistrate more or less accepting their version of the matter, as to which, see p. 276) have a good deal of choice which, if their instructions from authority above so direct, can be exercised in favour of one point of view or another. They can threaten the heckler with ejection or arrest if he does not keep silence or leave, and so they can maintain the meeting in the face of opposition. Or they can permit endless heckling so that the meeting has to close down, or even tell the organisers of the meeting to close down on the ground that that is the only way to avoid disorder. In the same way, if the speaker says something mildly provocative, they can threaten him with arrest for using insulting words and behaviour likely to cause a breach of the peace; or they can let him continue using the grossest provocation, and threaten the resentful audience with arrest. There has in recent months been a tremendous volume of evidence to the effect that the police in certain districts have been in this way deliberately favouring Fascist speakers and meetings and obstructing left-wing meetings, and even when all allowance is made for bias in the persons witnessing such incidents there is little doubt left but that this has certainly been taking place to a substantial extent. There is even one well-established case, which was raised in Parliament, where a perfectly orderly Communist meeting was bodily removed by a Metropolitan police officer for the express purpose of establishing a Fascist meeting in its place. It is not likely that he did this

without direction or at any rate encouragement or tacit approval from his superiors, but it was of course completely unlawful. (On the facts being proved, an apology was given!) With regard to the volume of such interference, as actually represented in police-court proceedings, it is to be noted that on the 7th July, 1937, the Home Secretary in the House of Commons confirmed that in the preceding twelve months there had been 320 prosecutions for offences in connexion with public meetings or demonstrations, the bulk of them being for insulting words and behaviour, obstructing the police, and assault.

*A case which came before the courts in 1934 pro*vided a very good illustration of the working out in practice of police opposition to the holding of meetings, and of the resulting destruction in effect of what may fairly be called the right of public meeting. Incidentally, it also illustrated the way in which magistrates will sometimes behave, even in important cases. At that time, the police in London were, as was well known, very anxious to prevent public meetings being held near to Labour Exchanges and similar establishments. No doubt they had had suggestions from above on the matter; but, be that as it may, they had no right to prohibit such meetings, and were reduced whenever their efforts were challenged to falling back on the plea either that the meeting was obstructing the traffic or that in some way or another the meeting might lead to a breach of the peace. The particular meeting involved in the case was held, or rather begun to be held, on the 30th July, 1934, in a street where there was an entrance to a "Training Centre" for

unemployed men. The street was a fairly broad cul-de-sac, so that no case could be made out of obstruction to traffic, and the police quite fairly disclaimed any such suggestion. Nor was there any ground either for suggesting that the speakers at the meeting would do anything unlawful, either by way of inciting to a breach of the peace or otherwise, or for supposing that any crowd that gathered would be in any way hostile. However, as soon as the meeting began, and the first speaker mounted a small box to address some thirty people, the police without giving any reason for their action, told her to stop, and on her refusing arrested her on a charge of obstructing them in the execution of their duty. They told her that there was no objection to her holding the meeting in another street, 175 yards away, which appeared to confirm that they had no apprehension that she might say anything that would lead to a breach of the peace. (The thoughtless critic will often ask, in cases of this kind, why the promoters of meetings do not go to the alternative point; but the answer is that at such points you cannot generally get an audience and that it is in any event very dangerous to allow a system to be established whereby the police select the places at which political meetings should be held.)

The speaker was duly charged at the police court with obstructing the police in the execution of their duty, and the question on which the case turned was thus whether it was part of the policeman's duty to prevent her holding the meeting. If it was, she had obstructed him; if it was not, she was within her

rights and should be acquitted. At first sight, of course, on the law as explained above, the police had interfered with her when she was doing a perfectly lawful act, and they had accordingly to produce some reason; and the reason they produced in court was this, that about fourteen months before, a meeting had been held at the same place addressed by the same speaker, and that a few hours afterwards there had been a disturbance inside the training centre; they did not attribute this to anything she had said, and indeed there was no evidence as to what she had said, and no suggestion that she had said anything whatever that was objectionable, or that anyone in any way connected with the disturbance had heard a word of her speech. On this slender foundation, the police built up the justification that they had a reasonable apprehension that on this occasion a breach of the peace might follow, although she would be wholly guiltless of any offence of any kind. Thirty years ago, it may be asserted with confidence, any lawyer and any court would have said that, if a perfectly innocent person wanted to perform the lawful act of addressing a public meeting, and there was no suggestion that she was going to provoke or incite a breach of the peace, nor even that her observations were going to make a hostile audience attack her, the police had no right whatever to stop her, and if they really did anticipate that someone else, somewhere else, would commit a breach of the peace it was their duty to see that that someone else did not. It is on this view of the law that the police have repeatedly acted, and still act when they employ hundreds and occasionally

even thousands of men to protect Fascist demonstrations and processions from the desire of the public to break them up. But in this case, in 1934, the police without even any suggestion that the anticipated disturbance inside the training centre would be, or the previous one had been, in any way difficult to control, claimed the right to avert the allegedly anticipated breach of the peace by preventing the meeting being held; and it is interesting to follow the evidence adduced in support of the claim and the reception which it had from the courts. The police justification succeeded in the police court and the speaker was convicted and fined. There is no reliable record of the actual proceedings in that court, but the speaker appealed to the County of London Quarter Sessions, where an official shorthand report makes it possible to know exactly what took place. The case came before a bench of magistrates presided over by a deputy-chairman, a barrister of many years' standing, appointed and paid to apply his legal training and experience to the task of presiding over the cases that came up. It was of course his duty, with his colleagues, to hear the evidence on both sides and to arrive at an impartial conclusion as to whether the case was made out, without concerning himself with motives or objects.

On appeals of this kind the prosecution has to begin by proving its case, (as mentioned at p.129), so that it is possible to see exactly not only what took place on the hearing of the appeal but also what was proved with regard to the previous incident where trouble was alleged to have taken place.

During the evidence of the first witness, a police officer, he was asked:

Q. "What is that training centre used for?

A. "For the training of the unemployed."

And the Deputy-Chairman intervened with the question:

"To teach them to be unemployed?"

Although the police were not, as already stated, attempting to make any suggestion of obstruction to the highway, the Deputy-Chairman soon intervened again and questioned the witness:

Q. "I suppose this box and the people round it would partly block up the roadway?

A. "Well, it was very very small.

Q. "What was very small?

A. "The box.

Q. "Were all the people there small too?

A. "No, there were about thirty people.

Q. "Ordinary-sized people, I suppose?

A. "Yes.

Q. "They were not pygmies, were they?

A. "No."

A few moments later, before the first of the six witnesses had even finished his evidence, the Deputy-Chairman intervened again:—

"What is the object of this appeal? Is it to establish a practice of ladies standing on boxes in public streets and addressing meetings? . . . It does not seem very desirable. . . . What is the object at the back of it? Is it that someone else is to decide when it is convenient to hold a meeting in a public street other than the police, and if so who?"

Having thus lent the weight of his position to the novel view of the law, that the time and place of meetings in public streets (where most working-class meetings have to take place) is to rest in the uncontrolled discretion of police officers, the Deputy-Chairman allowed the evidence to continue. The next witness described the arrival of the speaker with other followers, and the Deputy-Chairman said:—

"Followers were allowed, were they?"

The witness then explained that a small wooden box was put in the street upside down, as a small platform, and the Deputy-Chairman again spoke:—

"Upside down? . . . Did the speaker get into the box?"

A little later, he returned to the subject of possible obstruction of the highway. The witness having stated that there was no obstruction, the following dialogue took place:—

The Deputy-Chairman: "Was not the box in the highway?

A. "Yes.

Q. "Were there not people round the box?

A. "People were round the box.

Q. "You say there was no obstruction of the highway. You mean nobody was actually obstructed?

A. "That is correct.

Q. "Of course the highway was partly filled up?

A. "Naturally."

The only evidence as to the previous meeting, and the disturbance said to have followed it, was this. On the 25th May, 1933, a meeting was held at the same place, and the same woman spoke at it. As already

mentioned, there was no evidence as to what she had said, nor even a suggestion that she said anything to which any objection could be taken, nor that any of the men in the training centre had attended the meeting or heard what she had said, although after the disturbance she was seen in the street talking to the men in the road. There was, in truth, no evidence to connect the meeting with the disturbance at all. other than the statement of the Superintendent of the Centre, which he made in answer to a leading question from the Deputy-Chairman, and for which he was unable to give any reasons, that he attributed the disturbance to the meeting. So far as the evidence for the prosecution went, the disturbance itself consisted solely in one man jumping on to a table and singing the Red Flag. The police were sent for, but it did not appear from the evidence that they came, or that there was any difficulty in bringing the disturbance to an end. There was in addition some evidence, not very clear, from the prosecution that several meetings had been held at the same point during the fourteen months that had since elapsed, without any trouble following.

In the course of this evidence, the Deputy-Chairman intervened once again:

"Why is there this passionate desire to hold meetings in a particular place of which the police disapprove? . . . Apparently quite an objection is taken to holding them in this street. Is there something behind this?"

Counsel then suggested that it might be desired (a perfectly lawful desire, of course) to hold the meeting there because the street was frequented by persons

going to the training centre. To this the Deputy-Chairman replied:

"You are letting the cat out of the bag, are you—the cat out of the sack, out of the cul-de-sac. Is it really desirable that there should be these attempts to hold meetings at a place at which the public authorities do not wish them to be held?"

The appellant, the speaker, called two witnesses, men who had been present inside the training centre. They gave their account of how the disturbance in 1933 had arisen. According to them, so far from there being any ground for suggesting that the disturbance arose in any way from the meeting, the meeting was only held on the morning *after* the disturbance. The two witnesses, who were both unemployed motor drivers, were attending the training centre, where one was receiving tuition in boot-repairing, and the other in boot-repairing, carpentry, and hairdressing. One of them described the cause of the disturbance as follows:—

"The teacher was in the schoolroom giving a lesson on dogs, greyhounds, and lurchers, I was not interested in the programme, and he asked me in front of all the people what was a lurcher. I got up and told him straight a lurcher in my opinion was a man who remained in the background instead of going to the forefront to fight on behalf of his wife and children. . . ."

Counsel: "Was that when the trouble started?

A. "Yes, sir."

Counsel for the appellant then addressed the Deputy-Chairman, subject to interruptions, on the law and the facts. The following passages may be quoted:

Counsel: "The owner of the soil has his remedy in a civil action for trespass."

The Deputy-Chairman: "Or indict them, trespass is an indictable act. . . ."

(Trespass is not only not indictable; it is not a criminal offence at all.)

The Deputy-Chairman: "You are placing the police in a most impossible position. Their duty is to prevent any possible breach of the peace, and they must not run it too fine; they must not wait till a breach is committed. They have got to keep order in the streets——"

(The Deputy-Chairman was apparently unaware that no suggestion whatever had been made that there might be disorder in the streets.)

"—and if they see a person is doing something which would cause disorder——"

(He was apparently unaware that no suggestion was made that the speaker was going to do anything to cause disorder.)

"—to say they must not act until the disorder has actually been committed, or to say that the person himself is not committing a disorderly act——"

(No suggestion remotely resembling this had been made against the speaker.)

"—and that the police must wait till the crowd becomes threatening——"

(There was no suggestion whatever that any hostility in the crowd to the speaker was to be expected.)

"—it is almost impossible to keep order in the streets. You see, the police force is the protector of the public; it is a democratic body and it should be treated

as such, and to interfere with them and make their task more difficult unless they are doing something obviously wrong, is not the part of a good citizen."

Later on the Deputy-Chairman said:—

"Can you account for the police desiring to prevent this meeting unless they apprehended a possible breach of the peace?"

(This reminds one of the story of the magistrate who said to a defendant who was denying that he was in any way guilty of any of the charges against him: "Come, come. You must have done something, or you would not have been summoned.")

At the end of the argument, the appeal was dismissed without any reasons being given save so far as they appeared from the observations made by the Deputy-Chairman in the course of the case.

The matter was taken to the High Court on appeal by way of "case stated"[1] and on the facts as stated in the case the High Court dismissed the appeal. It came before that court, on that statement, as a case in which the disturbance fourteen months before had followed on the meeting and had been in some way due to it, and in which the police reasonably apprehended that a breach of the peace would occur if the meeting were held. The court ruled in law that the police were entitled to prevent the breach of the peace by forbidding the meeting, although neither the appellant nor anyone at the meeting committed, incited or provoked any breach of the peace. It is safe to say that, thirty years ago, even on the facts as stated, the court would not have given the same judgment; but no further appeal

[1] See p. 129.

was possible, and on the authority of this case the police authorities now have a really invaluable option if they choose to exercise it. If they are willing that some demonstration, say a Fascist one, shall take place, they are entitled to protect it with all the force at their disposal. If they are unwilling to permit a demonstration or meeting, they can say that once before some perfectly trivial breach of the peace took place, and they feared that another equally trivial breach of the peace might take place, and rather than send one constable to tell someone not to jump on a table and sing the Red Flag they prohibited the meeting. So long as a magistrate will accept their "apprehension" of a breach of the peace as reasonable, they will be fully justified. Truly, there is one law for the left, and another for the wrong.

Apart altogether from any such development of "case-law" from the decisions of modern courts, the Public Order Act, 1936, introduced a new and in many respects a highly dangerous element into the law relating to public meetings. It was passed in December, 1936, largely to deal with the Fascist habit of wearing uniforms, and on that point it has for the moment at any rate done a good deal of useful work, and might perhaps never be used against any legitimate activities. It also, however, makes it an offence to take part in the control or management of any association whose members are "organised or trained or equipped" for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown, or are "organised and trained or organised and equipped" either for the purpose of

enabling them to be employed for the use or display of physical force in promoting any political object, or in such manner as to arouse reasonable apprehension that they are organised and either trained or equipped for that purpose. It is equally an offence to take part in the organisation or equipment. Provisions are also made for seizing the funds of any such organisation, and for the grant of search warrants; and the law of evidence is virtually laid aside, in a manner reminiscent of the law of conspiracy,[1] by a provision that proof of things done or of words written spoken or published, even behind the back of any person charged, by any person taking part in the control or management, or the organisation training or equipment, shall be admissible as evidence of the purposes for which, *or even of the manner in which*, the members were being organised or trained or equipped.

When it is remembered that, in any period of tension, police courts, with all the defects and difficulties described above,[2] will be ready to believe the worst of anybody at any moment, and that it will be only too easy to smuggle *agents provocateurs* into the ranks of political organisations, who can make convenient statements which will become evidence of "purposes", "manners", and other vague and intangible states or qualities which become so easily distorted in times of anxiety, it seems incredible that the Liberal and Labour parties in the House of Commons welcomed and supported this Act. It may in the near future be used to cripple the activities and seize the funds of political organisations which ought not on any view to be

[1] See p. 240. [2] See pp. 13–16.

treated in this way. No one can complain or be surprised that a ruling class should take steps to protect its dying system against attack, so long as it is foolish or biased or selfish enough to think that the system is worth the sacrifice of whatever is the English equivalent of "the bones of one Pomeranian grenadier"; but the only people who can derive any consolation from provisions of this kind are the out and out revolutionaries, for they can at any rate say: "Ha! It is obvious that the Government agrees with us, and expects the revolution in the next two or three years."

But even with this provision the worst has not been realised of this remarkable statue. Again on the excuse of dealing with Fascists, and again with the approval of all parties in the House of Commons, power is given to the various police authorities, when they have the opinion (which cannot be tested in the courts) that they cannot otherwise prevent disorder, to prohibit all public processions for as much as three months in the whole or any part of the district they control. Public processions may not mean very much to the politically-indifferent middle classes, but to the whole vast mass of the political and industrial workers, who have little access to the columns of the great newspapers, they are the very breath of political life. By processions, or as they generally call them demonstrations, they not merely show their strength to themselves and others, but they gain adherents and, more important than all, they influence policy and administration. To give only one example, it was by demonstrations which showed the true measure of public indignation,

more than by any other means, that the Unemployment Assistance Regulations of February, 1935, were swept into their deserved oblivion. This part of the Act, which has already been used several times in London, will soon prove a powerful weapon in damping down political expression and propaganda; in the next period of tension, it will be widely applied, and critics will be reminded that the Liberal and Labour parties supported it.

There are other minor points in the Act to which attention need not be drawn here; but one apparently trivial provision is much more important than it looks. It has for many years been the law, *in the Metropolitan Police District*, that any person who in any thoroughfare or public place uses any threatening abusive or insulting words or behaviour with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, may be fined 40*s*. It was obviously regarded by Parliament in 1839, when it was made an offence, as quite trivial; it was grouped with shoeing horses in the street, letting horses loose, not holding the reins of your horse, letting barrows stand too long in the street, rolling tubs in the footway, "fly-posting", blowing horns, ringing door-bells and running away, flying kites or playing games to the annoyance of the inhabitants, and sliding on ice or snow. Not unreasonable, it may be thought. No, perhaps not, but it is notorious that this provision is often used as a way out by the less scrupulous policemen when they have arrested someone on a charge which they afterwards find cannot be sustained, or when they are annoyed with someone who

perhaps protests against something they have done. The clause has indeed gained the nickname of "the policeman's friend". Now, the Public Order Act repeats that clause so as to make it law over the whole country instead of merely in London. Not so unreasonable, perhaps? If London has a law that is not so bad in itself but is liable to easy abuse, the rest of the country may as well suffer with it. But, on the way, the wily Government does two things. The first is quietly to insert after the words "in any public place" the further words "or at any public meeting", and a public meeting includes any meeting which the public or any section thereof are permitted to attend, with or without payment. So now, at practically any meeting, any legitimate heckler may suddenly find himself arrested without warrant and charged under this section, and he will know that it is almost certain that the justices will accept what the policeman says.[1] If, as seems already to be the case in many instances,[2] the police for one reason or another are favouring one side, here is an extra and a handy weapon for the job. The other thing the wily Government has done is to raise the maximum penalty for this essentially trivial offence from 40*s.* to three months' imprisonment or a fine of £50, or both. (Even the right of arrest has been widened; under the earlier Act, the policeman could only arrest persons committing the offence within his view; now he can arrest any person reasonably suspected by him to be committing the offence.) And public men run round saying how great it is to think that we live in a land of liberty.

[1] See pp. 276–7.

[2] See pp. 248–50.

Before passing on, notice should be taken of a remarkable and illuminating example, to be found in the Emergency Powers Act, 1920, of the quiet and discreet fashion in which strong measures can be prepared for times of emergency. There is no machinery for "declaring martial law" in England; nothing which sounds so violent would be suggested. Nor do we even think of "suspending constitutional guarantees"; after all, in strictness we have none to suspend. But still, our Parliament in 1920 quietly passed an Act "to make exceptional provision for the Protection of the Community in cases of Emergency". That blessed word "Community"; what a great amount of care is devoted to protecting the "Community" against a possible outburst of accumulated rage and despair from the masses who are generally forgotten by those who think of the "Community". One is reminded of the old comic poem of the barge that was in peril in the Regent's Canal,

> "To keep the vessel from sinking, and to save each precious life,
> We threw the cargo overboard, including the captain's wife."

The short effect of this statute is that at any time, if the Government think (and the courts will not inquire into the ground or absence of ground for its thoughts) "that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution

of food water fuel or light, or with the means of locomotion, to deprive the community or any substantial portion of the community of the essentials of life", then the Government can "proclaim an emergency". The proclamation is only valid for one month, but the "state of emergency" can be carried on indefinitely by a series of proclamations.

It is interesting to observe that the words would cover some of the food restriction ramps, and possibly even some of the operations of Statutory Boards; but the Act has not yet been invoked for these purposes. It was of course used in the General Strike of 1926.

When the emergency has been proclaimed, what can the Government do? The Act wraps up the answer in many words, but the short answer is: "Anything it likes." It is empowered "to make regulations for securing the essentials of life to the community". (It would be a good idea, from one point of view, that regulations that really achieved that should be made now, and enforced.) Those regulations may confer or impose on any Government department, or anybody acting for the Government, any power or duty that the Government thinks necessary (and, again, the courts will not enquire into the grounds for their thoughts), for "the preservation of the peace"—this is our old friend "loranorder"—for securing and regulating the supply and distribution of food water fuel light and other necessities, for maintaining the means of transit or locomotion, and for any other purposes essential to the public safety and the life of the community. There are two limits graciously imposed, that the regulations are not to impose military

or industrial conscription, nor to make it an offence to take part in a strike or peacefully to persuade others to do so.

The regulations can be enforced by imprisonment and fine, but the right of the citizen to be tried before being sentenced is expressly preserved.

It does not require much imagination to see that any reactionary Government in any time of industrial tension can, if so minded, in due form of law and by using one sheet of paper a month, virtually do away with the whole protection of the existing law and the courts, and establish a complete military dictatorship.

So, taking it by and large, it will be seen that a pretty formidable collection of offences, incredibly wide and dangerously vague in definition, and often helped by a logical application of the law of evidence which practically amounts to its abrogation, lie half-concealed ready for use the moment any tension or emergency arises.

To turn now to political prosecutions, and the attitude and behaviour of the courts and the Government in relation thereto, let us first consider the Government. It may adopt a policy of prosecuting as frequently as possible, or only occasionally. The elasticity of the law is such that it has a very considerable discretion. It can if it wants always explain to Colonel Blimp that the law is so uncertain that a conviction is doubtful, and at the same time when it really wants to prosecute it can do so. It can certainly be said that at the moment, even in dealing with working-class and left-wing politicians, it does not prosecute whenever it can if only because the vagueness

and elasticity of the law is such as to make it possible to prosecute morning, noon and night. But there are some offences which it cannot abide. Anything that may cause actual disorder in a public place, even of a slight character, anything which tends to undermine the control of the police, and above all anything remotely connected with teaching the facts of life to the armed forces of the Crown, stirs it immediately into almost automatic action. In this respect, it contrasts remarkably with the attitude of the Government which had to deal with Carson, Smith, and company in the Ulster troubles.[1]

Moreover, as already mentioned, the Government will often prosecute under circumstances which plainly indicate that the real motive of the proceeding is not to preserve the law but to dispose temporarily of an awkward opponent. A somewhat flagrant example of this occurred in 1934.

On Sunday the 25th February of that year, a large and imposing demonstration of hunger-marchers was due to be held in Hyde Park, London, on the arrival of many marching contingents from different parts of Great Britain. Among the proposed speakers was Harry Pollitt, who was also announced to attend and address on the previous day the National Congress of Action, in London. Tom Mann was also prominently associated with the hunger-marchers, and it was obvious to any observer of the situation that the presence of Pollitt and Mann in London on the Saturday and Sunday was a matter of great interest and importance to many thousands of people.

[1] See pp. 221–7.

On the previous Sunday, the 18th February, 1934, both Pollitt and Mann had addressed meetings in South Wales, political meetings of course, but having no particular connexion with the hunger-marchers or their demonstration.

Now, on the night of Friday, the 23rd February, Pollitt was arrested in London, and Mann at Biggin Hill, where he was living, on warrants obtained on the 22nd by the Chief Constable of Glamorganshire, charging them with sedition alleged to have been committed by them in their speeches on the previous Sunday. (Incidentally, the officers who went to arrest Mann, who was out at the time, searched his house before he arrived, a completely unlawful proceeding.)

Whether these arrests were really an abuse of justice by the executive, or whether the executive had merely had the great good fortune to find a clear case of serious crime, justifying arrest, at a moment when the temporary removal of two political leaders was anything but unwelcome to them, must depend of course largely on the strength of the case against Mann and Pollitt for sedition—and to that the story will soon come. Mann and Pollitt were brought in custody to the police court at Pontypridd on the Saturday, where they were remanded. The magistrate allowed bail, £100 in their own recognisances and either one surety each in £100 or two each in £50. For some reason, he added the remark, which may be thought to be somewhat significant: "When the case comes on again, matters will be taken into consideration of what happens between now and then."

On the following day, the great demonstration in Hyde Park was successfully held; Pollitt and Mann did not appear on the platform. The speech which Pollitt was to have made at the Congress of Action on the Saturday had meanwhile been read for him by someone else, and on the Sunday he attended the further meeting of that Congress.

On the 28th February, 1934, the case was resumed at Pontypridd, and various police officers gave evidence, assisted by their shorthand notes, of what Pollitt and Mann were alleged to have said. It is not too much to say that, even if every word alleged had been said by the accused, the case for sedition was tenuous in the extreme, and it is extremely difficult to believe that any prosecution or any arrest would ever have taken place if it were not for the hunger-march; but the case was really much worse than that, for both in the police court and at the Assizes, to which Pollitt and Mann were committed, it was proved that the police witnesses who claimed to have taken down parts of the speeches verbatim had only the most rudimentary knowledge of shorthand. Indeed, an expert witness called for the defence said bluntly that they did not know shorthand at all. At the Assizes, the case against Mann was taken first, and was practically laughed out of court, whereupon the prosecution wisely offered no evidence against Pollitt. (As a sidelight on the way prosecutions are conducted, it is to be noted that, in the police court, when Pollitt gave evidence for Mann, he was asked in cross-examination whether he was a member of the committee of the Communist Party. The magistrate ruled that the question was a proper one, but Pollitt refused to answer it.)

The apparent contempt of the Government for the law they are supposed to maintain, whenever Communists or supposed Communists are involved, is indeed remarkable. In a case a few years ago, where Metropolitan police officers arrested a well-known Communist in the offices of the National Unemployed Workers' Movement, and exercised their legal right of searching the premises where the man had been arrested (it being suspected that they had delayed his arrest until he was on those premises, in order to get an opportunity to search them) they proceeded without a shadow of legality to remove a very large mass of documents having nothing whatever to do with the charge to Scotland Yard, to examine them at their leisure. In subsequent proceedings in which they and Lord Trenchard, the then Commissioner of the Metropolitan Police, were made to pay damages for this illegal removal, it was plain that they had broken the law quite consciously and deliberately; and it seems not unlikely that many of the police do not trouble to observe the law when the people involved are "merely Communists". One is reminded of the incautious observation attributed to a County Court judge before whom a left-wing politician recovered damages from a police officer for an illegal interference: "As there was no evidence that he was a Communist, I had to give him damages."

But more important than the attitude of the Government in these cases is the attitude of the courts. It is more important both because it has a greater effect and because a higher standard should be expected. The Government, after all, when it has decided,

for whatever motive, and whether with or without incidental illegalities in its search for evidence, to prosecute, cannot do much more, and cannot be expected to do less, than to put before its prosecuting counsel all the available evidence, and leave him to conduct the case. But the courts, and particularly the Assize Courts before whom most of the more serious of the political cases come, have at once a greater obligation to be impartial and a greater opportunity to display tendencies one way or another, particularly but by no means solely in the passing of sentence. Now it is here, always with a number of honourable exceptions, that the judges are seen at their worst. Their behaviour is very largely the quite unconscious product of their up-bringing and environment, no doubt; and the prosecuting counsel, who owes a duty of impartiality also, is of the same up-bringing and environment. But the behaviour is there. A reasonably sensitive person has only to go into an Assize Court where such a trial is proceeding to catch at once an atmosphere of latent hostility which is extremely disquieting. Prosecuting counsel will open the case with a great show of fairness; he will tell the jury that everyone is entitled to his political views, and that it is no one's business even to enquire what his politics are, but that of course this, that or the other thing—whatever the charge may be—is criminal. On any question of adjournment, or of rulings as to admissibility of evidence, the judge will quite unconsciously lean against the defence, and both the accused and his counsel will begin to suffer from the latent hostility. When the time comes for the accused to

give evidence, sooner or later in the cross-examination the prosecuting counsel, looking meanwhile at the predominantly middle-class jury, will ask: "Are you a Communist?" All the fine pretensions are gone, and the weapon of hostility and prejudice is openly flourished. Counsel for the accused may protest and object. The judge may or may not disallow the question—it does not much matter, for the jury will have made up its mind from the question being asked that the accused is a Communist, and there is no opportunity to teach the jury laboriously and slowly that the offence charged is one which a Communist, as a Communist, would certainly not commit. That in itself is bad enough, but the judge's summing-up has yet to come. At best, it will necessarily suffer from the defect that the judge has never known what it is to live the life of the working-class man, to look through his eyes, face his problems, go through his unemployment, or come out on strike with him. At worst—and generally quite unconsciously—it will show not merely a failure to comprehend but a complete if latent intellectual hostility to the whole point of view of the accused. And, when the sentence comes to be passed, the same hostility will appear, and men who have, for example, merely sought to lead an unarmed demonstration which has been broken up by the police will be sent to prison for longer terms than men who have beaten up their wives, or embezzled thousands of pounds, or literally beggared thousands of people by large-scale company frauds. And in periods of tension the position is even worse. At the time of the General Strike in 1926, one of the few trains

that were ambling slowly along the railways, unable to travel fast on account of there being no proper signalling, had to pull up because some large stones had been put on the track. The lads who had done this, mostly aged about twenty, were of good character, but they were on strike. Several of them were sent to prison for ten years' penal servitude. The judge who sentenced them was in private life a kindly and good-natured man, but he had never been on strike.

Another interesting illustration of the difficulties of such cases occurred a few years ago. A number of men were charged with political offences, and all of them had decided to have counsel but one, a speaker of considerable ability and intelligence. They had been committed for trial for some few weeks, but had not yet received a copy of the indictment, an important document setting out the precise charges on which they would be tried, and normally delivered a reasonable period before the trial. Whether by indifference or design, the authority responsible for supplying a copy, in spite of pressure from the accuseds' solicitor, did not supply it until 4.30 on the afternoon before the morning on which the cases were due for trial at 10.30. On studying the document, the solicitor saw that the man who proposed to defend himself was now charged with an offence punishable with penal servitude for life, while the only previous charges against him were minor ones for which the maximum penalty was one year's imprisonment. The question at once arose whether he should continue to defend himself, or should have counsel, and if so whether the same counsel as the other men or a different one.

In the circumstances, an adjournment was essential; there was of course no opportunity to make an application earlier than 10.30 the next morning, when the cases were called on; and this was done. Now, the judge had been known, before he became a judge, to have had an implacable hostility towards men of the political opinions held by these men, and towards offences of the type in question. No doubt he intended to be, and was, perfectly fair in dealing with the application for adjournment; but for a long time he was unable to see why he should grant it at all, pointing out among other things that if he granted it it was too late for him to find another case to try and that a day of judicial time would thus be lost. (This was not after all the fault of the accused, who had not received a copy of the indictment.) However, in the end, he did grant an adjournment, for twenty-four hours only.

Of the juries in these cases, little need be said; they are typical middle and lower-middle-class people, unconsciously packed with the prejudices of their class, puzzled, and often alarmed. It hardly needs a vigorous summing-up to lead them to convict the accused.

With regard to the many cases with a political flavour that come before magistrates, much the same can be written, but there are a good many minor differences. The serious cases come, of course, before the magistrates merely to be committed for trial to the higher courts; but they have themselves to deal with innumerable trivial cases arising out of political meetings or demonstrations (obstructing

traffic, obstructing police, insulting words, assaults, etc.) and with minor cases also arising out of riots or other disorders, where a less serious charge is put forward in order to enable the cases to be dealt with summarily. As has already been pointed out, it is difficult to expect too much impartiality from magistrates who are actually appointed for the most part on political grounds, and the conduct of the benches before which such cases come (whilst positively welcomed as an advantage by prosecutors) will often attain the dimensions of a scandal. They begin with a definite political mind; they suffer generally from the natural fearfulness of old men, to which is added at times an undue self-importance and a sense of responsibility born of the knowledge that in the event of riots they as justices will be directly responsible for maintaining order by the use of the police and if necessary of troops, and may be held responsible if they fail; and they share with too many other people an inability to sympathise with or even to understand the feelings and difficulties of the defendant. The difficulties in the way of impartial judgment in all the circumstances are naturally very great, but they are immensely increased by the position of the police. In theory, the policeman giving evidence is exactly the same as any other citizen; the magistrates should carefully consider his evidence, see where the inherent probabilities lie and what corroboration there is, and after testing the evidence for the defence in the same way and by the same principles, decide the case one way or the other, according to the weight of evidence. In actual practice a few Benches do do that; a few more try

to do it; a number start with a strong bias in favour of the police evidence but are ready in any particular case to have it dislodged from their minds on contradiction by cogent evidence; still more accept the police evidence automatically; and some even openly announce that that is their practice. (It is not confined to lay justices; one Metropolitan stipendiary who as a barrister had appeared regularly for the police said on the day of his first sitting in court to a solicitor who was cross-examining a police officer: "If you are going to ask me to disbelieve the police, you are wasting your time.") It is really a major evil, but one can well understand the attitude both of the justices and of the police. The justices want order preserved; it is simpler and more congenial than redressing grievances. It is always present to their minds that the police have to keep order and to repress thefts, assaults, and other anti-social acts as well as the expression of left-wing politics, that many of the people whom the police charge are probably guilty, and that, if they do not "back up" the police, defendants who would otherwise plead guilty will plead not guilty and take up time—perhaps even be acquitted. They fear, too, that if they do not accept the police evidence the police, who do not like losing cases, will not bring cases that ought to be brought, and criminals will thus escape punishment. And, when it comes to political or industrial tension, and the justices are alarmed, all these arguments are immensely reinforced. With all these considerations, it is not surprising that justices generally accept police evidence, even in the face of overwhelming demonstration that it must be false.

And the position of the police is equally comprehensible, and even more serious. They have to keep order and repress or detect crime. They often suspect where they cannot prove, and still more often want to prosecute on rather weak evidence on which a court ought not strictly to convict. And very often they have the uncorroborated evidence of one police officer which, if accepted, is ample to convict. It does not take them very long to get the exact measure of a Bench, to know exactly what will secure a conviction before it, and how tenuous or improbable a story must be before that Bench will refuse to swallow it. Police would be superhuman if, in those circumstances, they did not sometimes embroider a little, and sometimes "run in" a man for an offence he may not have committed because they feel morally sure he has committed another. And they would be more than superhuman if, in times of tension, they did not occasionally give way to the temptation of getting rid for a time of a particularly formidable opponent by prosecuting him on evidence which, however unreliable, they feel confident the justices will accept. The justices and the police thus form a vicious circle, the attitude of the former encouraging the latter to bring cases that ought not to be brought, and the latter helping to corrupt the former by giving them the opportunity to convict those who should not be convicted. In extreme cases it may be said that there is a half-conscious conspiracy between the police and the magistrates to maintain "order" irrespective of the proper and impartial trial of cases.

One or two illustrations of the way police evidence

is given may not be amiss. A police officer has to record in his notebook any occurrence of any importance; very often two police officers will give evidence, each refreshing his memory by producing his notebook, very neatly and clearly written, without alterations. Each will swear that he recorded the matter in his notebook at the time, and that what he produces is the original note and not a fair copy of an earlier note. Each will swear that he did not have any other book or piece of paper on which he took a first rough note. Each will swear that he did not compare notes, orally or on paper, with the other, and that his note is an entirely independent production. The two notes will be textually identical, and each officer will be unable to explain the coincidence. The justices will accept the evidence and convict the prisoner, and every experienced practitioner will know that the same thing will happen with another case and two other police officers in the same or another court the next day or the next week.

In an important political case a few years ago, it was noticed that one police officer was giving evidence like a child reciting something learnt by heart. He was tested by cross-examining counsel, who asked him four or five times to go back to a particular word, start again from there, and continue; it was found that he was "word-perfect" every time, repeating exactly what he had said in his "evidence in chief". It was then noticed that the words which he was thus repeating were the words of the "depositions" written down by the clerk at the police court as the notes of the evidence he had there given. Now, there is

a very strict rule, designed to prevent witnesses learning by heart and to secure that the evidence they give shall so far as possible be their genuine recollection, that, when they have given evidence in the police court and the clerk has written out that evidence in narrative form as "depositions" and read it over to them and they have signed it, the witnesses must not see the document or a copy of it again. This particular officer had made a written report at the time of the matters about which he was giving evidence, and his written report differed in many small details from the depositions. Every bit of his recital in the witness-box came, so far as wording went, from the depositions and not from the report; and yet when challenged as to how he had got hold of a copy of the depositions, which he ought not to have had, he stoutly denied that he had ever seen them or a copy of them since the moment when he signed them. His evidence was accepted.

Another and more amusing case took place at a police court in the Midlands, where a Socialist speaker was charged. A police officer gave evidence, and swore that he had taken the speech of the accused down in shorthand, word for word, as he uttered it. He was asked to submit to a test in court and did so; he was provided with a chair and table, and the accused, who happened to have a strong Scots accent, addressed him for about five minutes. He then confessed that he had not been able to get down one syllable of what had been said. Several witnesses for the defence testified that the Scotsman had simply repeated the speech the subject of the charge, which the police

officer claimed to have taken down, at the same speed and in the same accent. The Scotsman was convicted.

There is of course a very serious aspect of this half-conscious alliance of the police and the justices, with the defects of both inter-acting in this way. One result of it is and must be to diminish rapidly and steadily the freedom to hold public meetings. Such meetings are a nuisance to the police; it often means keeping more men on duty, there is always a chance of some minor trouble developing, or of traffic being really obstructed, and if the meeting can be plausibly closed down a lot of bother is saved. If the police can rely on the justices to convict on charges of obstructing traffic, obstructing the police in the execution of their duties, or of "insulting words and behaviour", they can without much difficulty close down any meeting they like. The other evil result is that, if higher authority chooses to give a hint to the police that this power to keep order, and if necessary to close down a meeting, should be exercised in favour of or against one particular party, it is an extremely easy hint to follow out.

Apart altogether from the question of their conduct in connexion with prosecutions, there are of course widespread accusations of brutality against the police in connexion with political processions and demonstrations. Their task is often difficult, and in many instances they display exemplary patience, but when all the evidence has been sifted, and duly discounted for bias, there is no doubt that acts of unjustified violence on their part are all too common. Impartial observers who have seen the so-called baton charges

have given terrifying and indeed disgusting accounts of them; far the worst offenders are some of the superior officers in whose control lies the question whether an unarmed crowd of men, women and children shall or shall not be charged and beaten up, but the rank and file of the police have to obey their orders and it is of course notorious that, once the first plunge is taken, the beating up of one's fellow men provides a definite sadistic pleasure. That such charges should become increasingly common in a time of industrial quiescence is extremely disturbing; what will happen in the next big lock-out or strike, one trembles to think.

No one can tell to what exact extent the police abuse their position, but the suspicions so widely entertained are not lessened by the touchiness displayed by the Government when any criticisms are advanced, or by the almost invariable refusal of any independent enquiry even when numbers of trustworthy witnesses assert that their conduct has been violent and inexcusable.

It should be emphasised that the possibility of the executive making a really serious use of the judicial system against its political opponents grows at once greater and more serious every day. Everything favours such a development. The time is one of capitalist decay and revolutionary ferment. The next Great War has in a sense already begun. The courts are really an admirable weapon. They start with a good reputation among the middle class; those who say "It can't happen here" will go on saying "It isn't happening here" all the time it happens, and this will

at any rate operate to delay public opposition. The judges, fortified by their class bias and by their own unconsciousness of it, will serve as excellent tools of the executive whilst still quite sincerely believing that they are impartial. The juries will of course have the perfect suburban golf-club mentality which is every reactionary's dream of heaven. The magistrates, as already explained, will be as good as the juries; they have, it is not unfair to say, every vice that could possibly be desired by a persecuting executive. A combination of political bias and plain funk with a complete lack of any idea of judicially weighing evidence, excluding irrelevant matters, or insisting on cases being properly proved, will lead to their convicting everyone involved in any case that has any flavour of politics. It must be remembered that it is just in cases where the intention of the accused is an element in the make-up of the offence, as it so often is, and in cases where the definition of the crime is extremely vague, that poor or untrained tribunals are at their very worst. With none of the skill of trained lawyers, without any aptitude for deciding inherently difficult questions of this kind, and no professional conscience to restrain them, they will simply decide all such questions in accordance with their own conscious or unconscious bias. The vital and tragic feature, of course, is that, with such courts, it is not merely that nearly everyone who is prosecuted will be convicted; it is that the executive and its officials, important or unimportant, will be encouraged to launch many prosecutions which they would never venture to attempt before stronger courts. Every prosecuting department must always

consider, as one of the most important points in deciding on prosecutions, whether the courts are likely to convict, and will often leave unbrought even a comparatively strong case if there is a moderate risk of failure, so much does it fear the effect of acquittals. If it can rely in general both on juries and on magistrates to convict, and if in any difficulty it has the option to go either before magistrates or before a jury (as, for example, it now has under the Incitement to Disaffection Act, 1934, side by side with the Incitement to Mutiny Act, 1797) it will prosecute as often as it thinks really helpful to its own point of view. It can be seen from the tendencies both of recent prosecutions and of recent legislation that we are already half way towards a great extension of political trials.

CHAPTER X

CONCLUSIONS

THE TIME HAS now come to look at the picture as a whole. It is not of course a picture of unrelieved gloom; there is light as well as darkness; but the lessons which consideration suggests are disquieting. Some points appear to be only too clearly established. The first is that the specific defects of the legal machine definitely favour the rich against the poor, the Government against the working class. The second is that piecemeal reform, whilst worth while as far as it goes, can never do more than scratch the surface. Reforms improve the machinery, but their efforts are nullified both by reactionary legislation and by a steady deterioration of the spirit and outlook of the controllers of the machinery, as the general situation grows more acute. It is clear, indeed, that within the capitalist system no true equality or justice can be achieved. And the last and most general point is that this or any other legal machinery, whatever its origin or history, must succumb to the inexorable pressure of the mould in which the whole of society is for the present compressed, and must wear the livery and do the bidding of the masters of that society until their mastery perishes.

Our law, a thoroughly native growth, developed through centuries of feudal and agricultural life, its faults and virtues and peculiarities quite clearly

British, is now in twentieth-century industrial Britain as inevitably and fully twisted into the evil international shapes of capitalism and class-structure as any other part of the social system. The jury, for example, at one time so admired as a safeguard of individual freedom that in the great wave of liberal thought in the nineteenth century it was consciously adopted from our system by one country after another, has now gradually become, with class-conflicts sharpening and the legal qualifications placing the jury inevitably on the wrong side of the dividing line, as handy and reliable a weapon of reaction as any ruler could desire. The cumbrous mass of case-law, insensibly defying all efforts to simplify or even to understand the law, is saved from reform not so much by the vested interests of the legal profession as by the advantages which it bestows on the power of the purse in litigation and—far more important—on the executive power whenever it becomes necessary to use the elasticity of the law as a weapon against rising discontent. The magistrates, so grotesquely unfitted for the task of truly administering justice that they seem to present the exact antithesis of every quality they should possess, no doubt reached their position of wide powers and wide incompetence by a process of gradual development; but they are maintained in that position and secured against any but the most superficial reform by strong class reasons; their inefficiency is forgiven, for it weighs mostly on the poor and is at any rate cheap in first cost, and their outlook and prejudices are even more politically valuable to the executive than those of juries. The inadequacy of the

provision of legal aid for the poor, of less direct political importance, but economically as effective in preserving the mis-distribution of wealth as are wage-cuts or increases in living costs, shows perhaps more prominently than the jury system and the magistracy, although on a smaller scale, the genius of the system for pretending that all is well whilst in truth remedying no evil; as will be remembered, for example, the Poor Persons' Procedure, seems at first sight to cover all the needs of the poor litigant in the civil courts, whilst in reality he is left to fend for himself in 97½% of his litigation.

The legal machine runs true to form in one other respect, what might be called the "topsy-turveydom" that is always found in periods of breakdown. By a sort of perverse fate, reminiscent almost of classical Greek tragedy, the ruling class in its convulsive struggles to maintain the dying system spends most of its time doing the opposite of what it really wants to do. For example, it really wants more and freer international trade; and it spends its time setting up and enlarging tariffs, quotas, prohibitions, and currency restrictions, to destroy that trade. It really wants an increase in material wealth; and it spends its time restricting the production of almost every commodity save weapons of war. It really wants its workers to have more to eat; and it destroys a substantial part of those foodstuffs whose production it has not actually prevented. It really wants peace, and it bends its energies with the greatest of zeal to policies which multiply the risks of war, and to an intensified armaments competition which makes war more

certain than ever. And, in the same way, it really wants justice, and yet it works and can work nothing but injustice.

And the lesson? The lesson of course is that only in a Socialist state can there be justice.